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**IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF CALIFORNIA
OAKLAND DIVISION**

IN RE NATIONAL COLLEGIATE
ATHLETIC ASSOCIATION ATHLETIC
GRANT-IN-AID CAP ANTITRUST
LITIGATION

MDL Docket No. 4:14-md-02541-CW

DEFENDANTS' CLOSING BRIEF

Date: December 18, 2018
Time: 9:30 a.m.
Judge: Hon. Claudia Wilken
Courtroom: 6, Second Floor

This Document Relates to:

ALL ACTIONS EXCEPT *Jenkins v. Nat'l
Collegiate Athletic Ass'n*, Case No. 14-cv-
02758-CW

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TABLE OF ABBREVIATIONS

Abbreviation	Reference	Docket
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Defs.' Op.	Defendants' Opening Statement	Dkt. No. 993
Defs.' MIL Opp.	Defendants' Joint Opposition to Plaintiffs Motions in Limine	Dkt. No. 901
Elzinga Dir. Test	Elzinga Direct Testimony Declaration	Dkt. No. 986-1
Heckman Dir. Test.	Heckman Direct Testimony Declaration	Dkt. No. 986-2
Isaacson Dir. Test.	Isaacson Direct Testimony Declaration	Dkt. No. 986-3
MSJ Order	Order Granting in Part and Denying in Part Cross-Motions for Summary Judgment	Dkt. No. 804
Noll Dir. Test.	Direct Testimony of Dr. Roger G. Noll	Dkt. No. 1021-1
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Poret Reb. Test.	Rebuttal Testimony of Hal Poret	Dkt. No. 1044-2
Rascher Dir. Test.	Direct Testimony of Dr. Daniel A. Rascher	Dkt. No. 1020-1
Rascher Reb. Test.	Rebuttal Testimony of Dr. Daniel A. Rascher	Dkt. No. 1020-2
Tr.	Trial transcripts	n/a
[witness] Tr.	Plaintiffs' and Defendants' Revised Deposition Designations	Dkt. Nos. 1116-1117

INTRODUCTION

Defendants have proved once again that the NCAA’s limits on financial aid and benefits are procompetitive. Defendants offered days of testimony from six fact witnesses experienced in college sports, sports broadcasting, and education, about how the challenged rules help preserve consumer demand and contribute to the integration of academics and athletics. The testimony of these witnesses was corroborated by surveys and studies that they commissioned, testimony from Defendants’ economic experts Dr. Kenneth Elzinga and Dr. James Heckman, and a survey conducted by Dr. Bruce Isaacson demonstrating both that amateurism is a significant reason fans like college sports and that those fans are overwhelmingly opposed to Plaintiffs’ proposed relief. By contrast, Plaintiffs offered only expert testimony from two long-time opponents of the NCAA, anecdotal evidence from a handful of student-athletes who attended college before the move to cost of attendance (“COA”), and a survey that did not even purport to test Plaintiffs’ proposed relief.

Plaintiffs’ case—which began as a challenge to the NCAA’s prior GIA cap, based on the assertion that student-athletes were not receiving enough financial support to attend college—has finally emerged as an undisguised effort to “eliminate[e] all NCAA compensation rules.”¹ But because Defendants met their burden at step two of the rule of reason analysis, Plaintiffs need to prove that their proposed less restrictive alternatives would be “virtually as effective” as the challenged rules in preserving consumer demand for amateurism and contributing to academic integration, and “without significantly increased cost.”² They have not.

Because of the voluminous evidence that consumers value amateurism, Plaintiffs’ proposal that the Court eliminate all limits on financial aid and benefits incidental to participation in athletics could never be as effective in preserving consumer demand as the challenged rules. Plaintiffs’ two alternative injunctions fare no better, as each would still allow unlimited cash payments so long as they were characterized as “education related expenses or benefits,” such as a \$10,000, or \$100,000, or even a higher payment for maintaining the minimum GPA to stay eligible or even for showing up

¹ Pls.’ Closing at 34.

² *O’Bannon v. NCAA*, 802 F.3d 1049, 1074 (9th Cir. 2015) (internal quotation marks omitted).

1 to class. And Plaintiffs have offered no evidence at all about how their proposed less restrictive
 2 alternatives would promote academic integration. Their speculation that the conferences would
 3 adopt their own limits on financial aid and benefits incidental to athletic participation is not part of
 4 the less restrictive alternatives they proposed, and to the extent Plaintiffs are relying on conference-
 5 level rulemaking as a less restrictive alternative to meet their burden at step three, such a regime
 6 would not be as effective as having national rules and would be significantly more expensive to
 7 implement.

8 Unable to prevail at step three, Plaintiffs are left to argue that the procompetitive
 9 justifications Defendants proved again—consumer demand for amateurism, and integration of
 10 academics and athletics—are “economically invalid myths.”³ For this flawed proposition, Plaintiffs
 11 largely rely on what they call the “post-*O’Bannon* natural experiment,” which consists of
 12 purportedly observing no significant change in consumer demand after the NCAA allowed full COA
 13 athletic scholarships in compliance with the Ninth Circuit’s ruling in *O’Bannon*.⁴ Even if there were
 14 valid data concerning consumers’ reactions to the move to COA scholarships—and there is not⁵—
 15 such data would say nothing about how consumers value amateurism, because as this Court, the
 16 Ninth Circuit, and even Plaintiffs’ expert agreed, COA scholarships are consistent with the principle
 17 of amateurism.⁶ Plaintiffs simply have no basis in the record to dispute the fact that substantial
 18 consumer demand exists for amateurism in college sports.

19 ³ Pls.’ Closing at 1.

20 ⁴ See, e.g., Pls.’ Closing at 3.

21 ⁵ Plaintiffs’ “natural experiment” relies heavily on revenue growth from Defendants’ media rights
 22 agreements as a proxy for demand. That revenue growth proves nothing, as Dr. Rascher conceded
 23 that aside from “a couple” of those contracts, those media rights agreements were entered into prior
 24 to 2015 and had escalating revenue clauses at the time they were executed. Tr. 31:3-7, 33:7-15. Dr.
 Rascher also conceded that there are a number of reasons revenues could be rising in college sports,
 just as there are a number of reasons attendance could be declining (which it is). Tr. 26:3-14, 29:11-
 24.

25 ⁶ See *O’Bannon*, 802 F.3d at 1074-75 (finding from record that “raising the grant-in-aid cap to the
 26 cost of attendance would have virtually no impact on amateurism”); *O’Bannon v. NCAA*, 7 F. Supp.
 27 3d 955, 1005 (N.D. Cal. 2014) (holding that “the NCAA could permit FBS football and Division I
 28 basketball schools to award stipends to student-athletes up to the full cost of attendance, as that term
 is defined in the NCAA’s bylaws, to make up for any shortfall in its grants-in-aid” as a “legitimate
 less restrictive alternative for achieving” the NCAA’s goals of “preserving the popularity of the
 NCAA’s product by promoting its current understanding of amateurism and improving the quality of
 educational opportunities for student-athletes by integrating academics and athletics”); Tr. 260:10-
 (cont.)

The idea that amateurism is a “myth,” moreover, would surely come as a surprise to the Supreme Court and every other court—including this Court and the Ninth Circuit in *O’Bannon*, five other circuits (the Seventh Circuit as recently as this past June), and numerous other district courts—that have held otherwise.⁷ Those holdings confirm what Defendants showed at trial: that consumers value amateurism and that the challenged rules promote both amateurism and the integration of athletics and academics, as well as the integration of student-athletes into their college communities.⁸ These conclusions are made all the more clear in light of the Ninth Circuit’s mandate that “appropriate deference” be given to the Supreme Court’s observations about the procompetitive nature of amateurism in college sports.⁹

I. PLAINTIFFS FAILED TO PROVE A NEW ANTITRUST VIOLATION OR MATERIAL FACTUAL CHANGE SINCE *O’BANNON*

Consistent with this Court’s summary judgment order, Plaintiffs do not dispute that *O’Bannon* dooms their claims unless they have proved “either (1) an actionable new antitrust violation that occurred after *O’Bannon*, or (2) a fundamental, material change in the factual basis for the Ninth Circuit’s decision.”¹⁰ Plaintiffs did neither.

Plaintiffs argue in their closing, as they did at trial, that they made the required showing “because since *O’Bannon*, thousands of Class Members have received compensation and benefits above COA without any harm to consumer demand or integration.”¹¹ Plaintiffs also relatedly suggest (again as they did at trial) that Defendants recently began providing student-athletes with

19, 2097:17-2098:6 (Noll) (“An alternative to the GIA Cap is to permit athletic scholarships to be set at the cost of attendance, which is consistent with the principles of amateurism as set forth by the AAU and the other governing bodies in sports, including the NCAA.”).

⁷ See, e.g., *NCAA v. Bd. of Regents*, 468 U.S. 85, 120 (1984); *Deppe v. NCAA*, 893 F.3d 498, 499 (7th Cir. 2018); *O’Bannon*, 802 F.3d at 1078-79; *Agnew v. NCAA*, 683 F.3d 328, 345 (7th Cir. 2012); *Bassett v. NCAA*, 528 F.3d 426, 433 (6th Cir. 2008); *Smith v. NCAA*, 139 F.3d 180, 187 (3d Cir. 1998), *vacated on other grounds by NCAA v. Smith*, 525 U.S. 459 (1999); *Law v. NCAA*, 134 F.3d 1010, 1018 (10th Cir. 1998); *McCormack v. NCAA*, 845 F.2d 1338, 1354 (5th Cir. 1988); Herbert A. Hovenkamp, *Antitrust Balancing*, 12 N.Y.U. J.L. & Bus. 369, 377 n.27 (2016) (citing five additional district court cases).

⁸ See Part II, *infra*.

⁹ *O’Bannon*, 802 F.3d at 1063.

¹⁰ Pls.’ Closing at 38.

¹¹ *Id.* (emphasis omitted).

four new categories of benefits that are inconsistent with amateurism: COA stipends, Student Assistance Fund (“SAF”) payments, incidental benefits, and Pell Grants.¹² But these claims are flatly contradicted by the evidence at trial. As Plaintiffs’ own expert conceded, student-athletes could receive more than COA prior to *O’Bannon*.¹³ Indeed, both this Court and the Ninth Circuit acknowledged the very same thing in *O’Bannon*.¹⁴ Plaintiffs’ experts also conceded that all four categories of benefits that Plaintiffs suggest in their closing are new or unprecedented in fact existed prior to *O’Bannon*.¹⁵

Moreover, each of those four benefits is fully consistent with amateurism. The Ninth Circuit explicitly reached that conclusion as to COA and Pell Grants.¹⁶ And there was extensive evidence at trial demonstrating that neither SAF nor any other benefit incidental to participation function like pay for playing college sports.¹⁷

¹² See Pls.’ Closing at 24-28; Noll Dir. Test. ¶¶ 48-92. It is not accurate that Defendants or their members provide student-athletes with Pell Grants. As required by federal statute, 20 U.S.C. § 1070a, Pell Grants are awarded by the Department of Education on the basis of financial need. J1517-0001 (“Awards for each of the Federal Student Aid (FSA) programs are based on some form of financial need, beginning with cost of attendance.”); J1518-0002 (“Pell Grants are considered to be the first source of aid to the student, and packaging FSA funds begins with Pell eligibility.”). Pell Grants are granted to students “within a particular income level,” “based on the need of the particular student.” Tr. 694:16-19 (Alston); Tr. 880:1-3 (Blank).

¹³ See Tr. 33:16-34:16 (Rascher). Since at least 2004, the U.S. Department of Education has recognized that student-athletes could receive a “full Pell Grant” even if their financial aid needs had “already been met” by an athletic scholarship. COA Stip. ¶ 11.

¹⁴ 7 F. Supp. 3d at 974; *O’Bannon*, 802 F.3d at 1059 (recognizing that “student-athletes are permitted to accept Pell grants even when those grants raise their total financial aid package above their cost of attendance”).

¹⁵ See Tr. 33:16-34:16 (Rascher).

¹⁶ *O’Bannon*, 802 F.3d at 1075 (“A compensation cap set at student-athletes’ full cost of attendance is a substantially less restrictive alternative means of accomplishing the NCAA’s legitimate procompetitive purposes.”); *id.* at 1078 n.24 (observing that Pell Grants are “intended for education-related expenses” and “available to athletes and nonathletes alike”).

¹⁷ See, e.g., J0024-0247 (NCAA Bylaw 16.11.1.8) (Student Assistance Fund. “A student-athlete may receive money from the NCAA Student Assistance Fund. Member institutions and conferences shall not use money received from the fund to finance salaries and benefits”); see also *id.* at 0211-12 (NCAA Bylaw 15.01.6.1) (Student Assistance Fund. “Member institutions and conferences shall not use money received from the fund to finance salaries and benefits”); J0021-0014 (2018 Division I Revenue Distribution Plan) (“As a guiding principle, the SAF shall be used to assist student-athletes in meeting financial needs that arise in conjunction with participation in intercollegiate athletics, enrollment in an academic curriculum or to recognize academic achievement as determined by conference offices.”); *id.* at 0016 (graph showing categories of SAF uses, nearly three-quarters relating to educational, health, or safety expenses); Tr. 1275:12-22, 1276:25-1277:8, 1303:20-1304:3, 1308:7-1309:12, 1322:14-20, 1624:25-1627:1 (Lennon) (benefits are provided in a way consistent with the principle of amateurism, including through caps on (cont.)

1 Plaintiffs’ claim therefore boils down to the assertion that Defendants violated the antitrust
 2 laws by implementing *the very relief ordered by O’Bannon*, and not eliminating these other
 3 categories of benefits. This Court rejected that theory at summary judgment, holding that
 4 Defendants cannot be liable for changes “required and approved by the Court.”¹⁸ In *O’Bannon*,
 5 moreover, both the Ninth Circuit and this Court expressly contemplated that student-athletes could
 6 receive benefits in excess of COA and never suggested that any of the existing categories of benefits
 7 that Plaintiffs highlight in their closing is inconsistent with amateurism.¹⁹ In fact, the Ninth Circuit
 8 was clear that “[t]he Rule of Reason requires that the NCAA *permit* its schools to provide up to the
 9 cost of attendance to their student athletes”—not that the NCAA must *prohibit* schools from
 10 providing educational expenses or benefits incidental to participation in addition to cost of
 11 attendance, while still prohibiting pay-for-play.²⁰

12 Plaintiffs are also wrong to suggest that several minor changes to the NCAA rules since 2015
 13 warrant disregarding *O’Bannon*, especially in light of “the Supreme Court’s admonition that [courts]
 14 must afford the NCAA ‘ample latitude’ to superintend college athletics.”²¹ In their closing (at 39),
 15 Plaintiffs contend that there have been ten “significant amendments to the NCAA’s bylaws” since
 16 the *O’Bannon* record closed. But the evidence at trial establishes that these alleged “amendments”
 17 do not represent material changes. Plaintiffs, for example, note that NCAA bylaws now permit
 18 “sports federation payments to international athletes”—but this change merely brought treatment of
 19 international athletes in line with American athletes, who could already receive these payments
 20 before *O’Bannon*.²² Similarly, Plaintiffs note that class members can now borrow against their
 21 earnings to buy loss-of-value insurance—but such insurance was available to class members prior to
 22 *O’Bannon* through the Student Assistance Fund and student-athletes could previously borrow
 23
 24

benefits to prevent them from becoming “a form of pay”); *see also* Part II.D, *infra*.

¹⁸ MSJ Order at 20.

¹⁹ 802 F.3d at 1059, n.24; 7 F. Supp. 3d at 972 n.5.

²⁰ 802 F.3d at 1079 (emphasis added).

²¹ *Id.* (quoting *Bd. of Regents*, 468 U.S. at 120).

²² D0680-0010.

1 against future earnings for other forms of disability insurance.²³ And many of the other changes
 2 Plaintiffs claim (at 39) are “significant amendments” represent exceedingly minor tweaks to the
 3 rules, such as the fact that institutions may now cover “certain meal and lodging expenses” for the
 4 families of FBS football recruits (while in the past such expenses could be covered only for
 5 basketball recruits) and student-athletes hosting a recruit now can receive a daily stipend of \$75 (as
 6 opposed to the previous limit of \$40 per day). Such changes do not constitute “a fundamental,
 7 material change in the factual basis for the Ninth Circuit’s decision.”²⁴

8 That is particularly true given Plaintiffs’ concession at trial that all of these purported
 9 amendments represent “expansions” of benefits, not “restrictions.”²⁵ In effect, Plaintiffs are asking
 10 this Court to conclude that Defendants have committed a new antitrust violation since *O’Bannon* by
 11 *loosening* their allegedly anticompetitive rules through minor adjustments. This Court should reject
 12 this novel and baseless theory.²⁶ Aside from perversely suggesting that relaxing rules causes new
 13 antitrust violations to arise where they did not exist before, Plaintiffs’ position would invite this
 14 Court or other courts to hold a trial any time minor rule changes are adopted. As even Plaintiffs
 15 themselves recognize (at 43), this is not the law; “antitrust jurisprudence counsels against courts

16 ²³ Hostetter Tr. 237:17-21; *see also id.* 74:14-75:11; J0025-0048 (2013-2014 NCAA Manual in place
 17 during *O’Bannon* trial) (NCAA Bylaw 12.1.2.4.4) (“An individual may borrow against his or her
 18 future earnings potential . . . for the purpose of purchasing insurance (with no cash surrender value)
 19 against a disabling injury or illness that would prevent the individual from pursuing a chosen career .
 20 . . .”).

19 ²⁴ Pls.’ Closing at 38.

20 ²⁵ Tr. 187:4-8.

21 ²⁶ This Court also should reject any claim that NCAA interpretations and waivers of its rules issued
 22 since July 2014 justify setting aside *O’Bannon*, as Plaintiffs put virtually no evidence in the record to
 23 show how waivers or interpretations warrant revisiting the Ninth Circuit’s decision. While Plaintiffs
 24 suggest that there have been many waivers and interpretations since 2014, Pls.’ Closing at 40, they
 25 provide only anecdotal evidence of changes, and they made no attempt at trial to establish how many
 26 have occurred since *O’Bannon*, which rules have been affected, or how these rules were allegedly
 27 changed—much less how such a change would warrant a departure from *O’Bannon*. In any event,
 28 by their very nature of *waiving* application of NCAA rules, none of the waivers could reflect a new
restraint on how universities conduct their affairs. Indeed, Plaintiffs identify only a pair of related
 changes that post-date *O’Bannon*: a single interpretation—the NCAA’s travel pilot program which
 allows reimbursement of expenses for a small group of family members to attend the College
 Football Playoff—and a single waiver—which similarly allows the NCAA to reimburse expenses for
 family members to attend the Final Four. And while Plaintiffs cite the NCAA’s Waivers Checklist,
 the Checklist actually demonstrates that the previously approved waivers were first “approved with
 an immediate effective date by the NCAA Division I Legislative Council during its *April 2009*
 meeting.” P0148-0001 (emphasis added).

1 acting as *de facto* regulatory bodies.” So long as the challenged restraints are consistent with their
 2 procompetitive justification, arguments that the defendants could have drawn the line in some other
 3 place are precisely what the Ninth Circuit warned against in directing that courts are not “free to
 4 micromanage organizational rules” and “should not use antitrust law to make marginal adjustments
 5 to broadly reasonable market restraints.”²⁷

6 **II. THE EVIDENCE AT TRIAL RECONFIRMED WHAT *O’BANNON* ESTABLISHED: 7 THE CHALLENGED RULES ARE PROCOMPETITIVE**

8 As in *O’Bannon*, this case is governed by the three-step rule of reason framework.²⁸ With
 9 the Court having resolved the first step in Plaintiffs’ favor at summary judgment, the burden shifts to
 10 Defendants to show a procompetitive rationale for the challenged restraint.²⁹ As detailed below,
 11 Defendants, as they did in *O’Bannon*, have proven the existence of two procompetitive benefits.
 12 Substantial evidence demonstrated that the challenged rules preserve consumer demand because
 13 amateurism is a key part of demand for college sports. The challenged rules also foster the
 14 integration of athletics and academics, thereby improving and maintaining the quality of the
 15 educational experience available to all students, including to student-athletes, as well as contributing
 16 to consumer demand.

17 The Court thus turns to the third step—what the Ninth Circuit in *O’Bannon* called “the final
 18 inquiry”³⁰—where Plaintiffs must make a “strong evidentiary showing” that specific “substantially
 19 less restrictive alternatives to the NCAA’s current rules” are “‘virtually as effective’ in serving the
 20 procompetitive purposes of the NCAA’s current rules, and ‘without significantly increased cost.’”³¹

21 ²⁷ *O’Bannon*, 802 F.3d at 1075.

22 ²⁸ “To determine whether a restraint violates the rule of reason, . . . a three-step, burden-shifting
 23 framework applies. Under this framework, the plaintiff has the initial burden to prove that the
 24 challenged restraint has a substantial anticompetitive effect that harms consumers in the relevant
 25 market. If the plaintiff carries its burden, then the burden shifts to the defendant to show a
 26 procompetitive rationale for the restraint. If the defendant makes this showing, then the burden
 shifts back to the plaintiff to demonstrate that the procompetitive efficiencies could be reasonably
 achieved through less anticompetitive means.” *Ohio v. Am. Express Co.*, 138 S. Ct. 2274, 2284
 (2018) (citations omitted); *see also O’Bannon*, 7 F. Supp. 3d at 985 (quoting *Tanaka v. Univ. of S.*
Cal., 252 F.3d 1059, 1063 (9th Cir. 2001)).

27 ²⁹ MSJ Order at 16, 18-19. *See generally Am. Express*, 138 S. Ct. at 2284.

28 ³⁰ *O’Bannon*, 802 F.3d at 1074.

³¹ *Id.* (quoting *Cty. of Tuolumne v. Sonora Cmty. Hosp.*, 236 F.3d 1148, 1159 (9th Cir. 2001)).

As discussed in Part III below, Plaintiffs have failed to prove any less restrictive alternative meeting that test.

A. Plaintiffs' Articulation of the Legal Standard at Step Two Is Incorrect

Perhaps recognizing that Defendants have easily met their burden to prove procompetitive justifications at step two under the correct legal standard, Plaintiffs have repeatedly—and incorrectly—urged that Defendants bear the burden to show that the rules are “*necessary*” to create consumer demand for the college sports product, such that, but for the challenged restraints, demand would “collapse” or “fall[] off a cliff.”³² Likewise, Plaintiffs argue that Defendants must prove that the challenged restraints, by themselves, “*cause* ‘integration.’”³³ Not so. The test is a rule of *reason*, not the strict rule of necessity and causation Plaintiffs make it out to be. In reality, under controlling law Defendants need to prove only “that the NCAA’s ‘current understanding of amateurism’ plays *some role* in preserving ‘the popularity of the NCAA’s product,’” the “particular brand” of amateur sports that is intercollegiate athletics,³⁴ or that the challenged rules improve the quality of college education by *promoting* the integration of academics and athletics.³⁵

Plaintiffs also argue that it is Defendants’ burden at step two to prove that additional forms of compensation or conference-level rulemaking “would, in fact, negatively impact consumer demand.”³⁶ In so doing, they attempt to shift onto Defendants what is *their* burden at step three to prove the existence of equally effective but less restrictive alternatives, asserting essentially that Defendants have to prove the nonexistence of less restrictive alternatives to survive step two. The

³² Pls.’ Op. at 1-2, 10, 15, 18-19, 21, 23, 46 (emphasis added); *see also* Pls.’ Closing at 2 (stating that Defendants have a “substantial burden” to prove that “the challenged restraints preserve consumer demand”).

³³ Pls.’ Closing at 2, 18.

³⁴ *O’Bannon*, 802 F.3d at 1059 (emphasis added) (quoting *O’Bannon*, 7 F. Supp. 3d at 1005); *id.* at 1079 (quoting *Bd. of Regents*, 468 U.S. at 101-02).

³⁵ *O’Bannon*, 802 F.3d at 1059, 1081; *see also* *O’Bannon*, 7 F. Supp. 3d at 1004-05. By way of example, in *O’Bannon*, this Court concluded that the challenged rules had a procompetitive effect based on its finding that “restrictions on student-athlete compensation play a *limited role* in driving consumer demand,” along with other factors that also attract consumers. *Id.* at 1001 (emphasis added).

³⁶ Pls.’ Closing at 11-12; *see also id.* at 9 (arguing that Dr. Bruce Isaacson’s testimony does not help Defendants meet their step two burden because “consumer *opposition* to a compensation change does not equate to a respondent reducing consumption if the change were implemented”).

1 Ninth Circuit has expressly rejected such a reallocation of burden: “The correct inquiry under the
 2 Rule of Reason [at step two] is: What procompetitive benefits are served by the NCAA’s existing
 3 [challenged rule]?”³⁷ “It is only in the third step, where the burden is on the plaintiffs, when the
 4 court could consider whether alternative rules provide a procompetitive benefit. And even then, the
 5 courts’ analysis is cabined to considering whether the alternative serves the same procompetitive
 6 interests identified in second step.”³⁸

7 Plaintiffs also wrongly claim “that Defendants offered no *economic* evidence to meet their
 8 burden to prove the challenged compensation restraints preserve consumer demand for D-I
 9 basketball and FBS football,”³⁹ conflating *economic* evidence with *econometric* analysis. Plaintiffs
 10 cite no authority requiring the latter in order for a defendant to meet its burden at step two, and
 11 indeed there was no econometric evidence offered in *O’Bannon* on the subject of consumer
 12 demand.⁴⁰ Defendants offered extensive economic evidence—from economists, a survey expert,
 13 conference commissioners with significant experience in broadcasting college sports, and university
 14

15
 16 ³⁷ *O’Bannon*, 802 F.3d at 1073 n.17.

17 ³⁸ *Id.*; see also *id.* at 1079 n.25 (“[W]e do not decide, and the NCAA need not prove, whether paying
 18 student athletes \$5,000 payments [above cost of attendance] will necessarily *reduce* consumer
 19 demand. The proper inquiry in the Rule of Reason’s third step is whether the plaintiffs have shown
 20 these payments will *not reduce* consumer demand (relative to the existing rules).” (emphasis in
 21 original)).

22 To the extent *O’Bannon* does not preclude Plaintiffs’ case, Defendants do not need to prove *both* of
 23 the procompetitive justifications from *O’Bannon* to prevail or limit the scope of any injunctive relief.
 24 The Ninth Circuit’s rejection of the \$5,000 stipend was based solely on the procompetitive
 25 justification of preserving consumer demand. See 802 F.3d at 1076 (“The question is where the
 26 alternative of allowing students to be paid NIL compensation unrelated to their education expenses,
 27 is virtually as effective in preserving amateurism as *not* allowing compensation. We cannot agree
 28 that a rule permitting schools to pay students pure cash compensation and a rule forbidding them
 from paying NIL compensation are both *equally* effective in promoting amateurism and preserving
 consumer demand.” (internal quotation marks and citations omitted; emphases in original)).

³⁹ Pls.’ Closing at 6 (emphasis added).

⁴⁰ See also *Cal. Dental Ass’n v. FTC*, 224 F.3d 942, 949 & n.5, 956 (9th Cir. 2000) (affirming
 procompetitive justifications for restrictions on dental advertisements based solely on testimony
 from dentists about harm that would result if restrictions were lifted). Two other cases within the
 Ninth Circuit likewise concluded that sports organizational rules were procompetitive with no
 mention of econometric analysis. See *Hairston v. Pac. 10 Conference*, 101 F.3d 1315, 1319 (9th
 Cir. 1996) (citing only *Board of Regents* for the proposition that the challenged rules are
 procompetitive); *Toscano v. PGA Tour, Inc.*, 201 F. Supp. 2d 1106, 1123 (E.D. Cal. 2002) (citing
Board of Regents and a single paragraph from the defendant’s statement of undisputed facts).

officials—about the procompetitive nature of the NCAA’s amateurism rules, both in preserving consumer demand for college sports and in fostering academic integration.⁴¹

B. The Challenged Rules Promote Consumer Demand for College Sports

1. *Uncontroverted Evidence Demonstrates That Amateurism Is a Defining Characteristic of College Sports That Contributes to Demand*

The uncontroverted evidence elicited at trial more than demonstrates “that the NCAA’s ‘current understanding of amateurism’ plays *some role* in preserving ‘the popularity of the NCAA’s product.’”⁴² Indeed, not even Dr. Daniel Rascher would testify that “amateurism has nothing to do with consumer demand.”⁴³ To the contrary, Dr. Rascher testified, “[b]ased on [his] understanding of economics [and] antitrust,” that it is “true” that “there is a level of disenchantment with paying athletes that would lead to a reduction in demand” for college sports, and that this relationship between consumer demand and pay-for-play “would be sufficient to meet the Prong 2 requirement of a procompetitive justification”⁴⁴ Plaintiffs’ survey expert, Mr. Hal Poret, would not opine that *any* amount of compensation could be offered without decreasing consumer demand.⁴⁵

At least six fact witnesses—from different schools, conferences, and the NCAA—testified from *personal experience* that consumers value amateurism.⁴⁶ Contrary to Plaintiffs’ assertions that this testimony is “entirely speculative” or amounted to nothing more than “unsupported belief,”⁴⁷ these witnesses’ testimony was properly “based upon particularized knowledge obtained by virtue of

⁴¹ Plaintiffs also improperly rely on the testimony of their economic expert witnesses, Drs. Rascher and Noll, to support substantive assertions of fact. The law is clear that, while an expert may rely on hearsay or other inadmissible evidence to explain the basis for his opinion, that evidence itself is not admissible for its truth simply because the expert relied on it. *Paddack v. Dave Christensen, Inc.*, 745 F.2d 1254, 1261-62 (9th Cir. 1984); *In the Matter of James Wilson Assocs.*, 965 F.2d 160, 172-73 (7th Cir. 1992). Accordingly, even though it may have been unobjectionable for Drs. Rascher and Noll to recite supposed historical facts as the basis for their opinions, what Plaintiffs now try to do—rely on those recitations as the evidentiary basis for the historical facts—is not allowed.

⁴² *O’Bannon*, 802 F.3d at 1059 (emphasis added) (quoting *O’Bannon*, 7 F. Supp. 3d at 1005).

⁴³ Tr. 58:11-13, 59:3-23.

⁴⁴ Tr. 66:9-15.

⁴⁵ Tr. 1693:1-20.

⁴⁶ While Plaintiffs denigrate this testimony as “repetitive,” Pls.’ Closing at 13, the consistent testimony from multiple witnesses involved in college sports at various levels only demonstrates the truth of such testimony.

⁴⁷ See Pls.’ Closing at 5, 13.

1 the witness's position in the business.”⁴⁸ In particular, “experienced businessmen [and
 2 businesswomen] know a great deal about what consumers think; that is personal knowledge”⁴⁹
 3 As detailed below, each of the six witnesses testified that his or her understanding of consumer
 4 demand was developed through frequent and substantial interactions with constituencies of college
 5 sports, and often supported by formal consumer studies.⁵⁰ Plaintiffs attack these witnesses,
 6 including non-party witnesses, as having a “pecuniary or philosophical interest in the *status quo*.”⁵¹
 7 It is not clear what having a “philosophical interest in the *status quo*” means, apart from Plaintiffs
 8 agreeing that these witnesses sincerely believe in the current model of amateurism based on personal
 9 experience. Nor is it credible to assert that whatever financial stake certain witnesses might have
 10 (the scope of which is highly speculative anyway) would lead them to alter their testimony.

11 a. American Athletic Conference Commissioner Mike Aresco

12 Commissioner Aresco explained that, even before he was an NCAA conference
 13 commissioner, he recognized—through decades of experience negotiating deals for ESPN and CBS
 14 to broadcast college sports to consumers⁵²—that “amateurism or not paying college athletes . . .
 15 does contribute to consumer demand”⁵³ and that many fans would not follow college sports as
 16 closely if student-athletes were paid.⁵⁴ This is not merely a personal opinion; broadcasters—

17
 18 ⁴⁸ In re Google AdWords Litig., 2012 WL 28068, at *4 (N.D. Cal. Jan. 5, 2012), rev'd on other
 19 grounds sub nom. Pulaski & Middleman, LLC v. Google, Inc., 802 F.3d 979 (9th Cir. 2015); see
 20 also Milton H. Greene Archives, Inc. v. Julien's Auction House LLC, 345 Fed. App'x 244, 247 (9th
 21 Cir. 2009); Cleveland v. Groceryworks.com, LLC, 200 F. Supp. 3d 924, 949 (N.D. Cal. 2016);
 22 Hynix Semiconductor Inc. v. Rambus Inc., 2008 WL 504098, at *4 (N.D. Cal. Feb. 19, 2008); Fed.
 23 R. Evid. 701 advisory committee's note to 2000 amendment.

24 ⁴⁹ *Ty Inc. v. Softbelly's Inc.*, 353 F.3d 528, 534 (7th Cir. 2003).

25 ⁵⁰ As the voluminous cases cited by Defendants in the prior briefing on this topic make clear, a
 26 witness does not lack personal knowledge of her or his business simply because that knowledge is
 27 derived from conversations had on the job. See Defs.' MIL Opp. at 5-7 (collecting cases).

28 ⁵¹ Pls.' Closing at 1.

⁵² Tr. 1003:17-1004:22, 1036:21-26, 1037:1-8, 1044:9-12.

⁵³ Tr. 1036:1-20.

⁵⁴ Tr. 1067:11-1068:2. Commissioner Aresco negotiated dozens, up to a hundred, college sports
 broadcasting contracts during his decades at ESPN and CBS. Tr. 1000:8-14. He worked at ESPN
 from 1984 to 1996, during which time college sports were fundamental to the development of the
 nascent network. Tr. 984:17-985:2, 987:8-988:11. While at ESPN, Aresco was responsible for
 making the television rights deals necessary to broadcast sporting events, with a focus on college
 football and basketball. Tr. 985:11-986:13. He was later promoted to Director of College Sports at
 ESPN, overseeing all college sports programming and deals at the network. Tr. 988:12-24. In 1996,
 (cont.)

1 including Aresco throughout his career—base their business decisions to *purchase* college sports
 2 events on that understanding.⁵⁵ They recognize that college sports represent a “purer form of
 3 competition involving amateur student athletes [that] resonate[s] with the public.”⁵⁶ And while still
 4 working at CBS, Aresco publicly shared these views, including in testimony before the Knight
 5 Commission.⁵⁷

6 Since Mr. Aresco became a conference commissioner, his understanding that amateurism
 7 supports consumer demand has only been reinforced. Among other things, his view has been
 8 confirmed by a survey he received of consumers’ attitudes toward college sports, which showed that
 9 71% of the public does not believe players should be paid.⁵⁸

10 b. Pac-12 Commissioner Larry Scott

11 Another conference commissioner, Larry Scott, likewise testified that “the very large
 12 majority of consumers value amateurism, think student athletes get a lot of support under the current
 13 system, and would not like to see them be paid or be professional.”⁵⁹ That understanding comes
 14 from myriad conversations directly with alumni, boosters, and fans generally. Those consumers
 15 have made clear to Commissioner Scott that “amateurism promotes consumer demand for college
 16 sports”⁶⁰; indeed, some said “they would not attend football and basketball games or watch them on
 17 TV if there were professional athletes playing.”⁶¹ Like Aresco and his colleagues at CBS, Scott
 18 recognizes that, in college sports, consumers see “there’s a different kind of a purity about the
 19 purpose and why the athletes are participating that is an important point of difference.”⁶²

21 Aresco left ESPN to go to CBS, where he worked until 2012. Tr. 995:22-25, 1005:24-1006:2.
 22 While at CBS, Aresco handled college sports programing, including negotiating TV contracts with
 conferences and the NCAA. Tr. 996:1-4, 996:21-997:21.

23 ⁵⁵ Tr. 1004:1-6, 1004:15-21, 1028:20-25, 1033:24-1034:8, 1035:5-11, 1036:1-20.

24 ⁵⁶ Tr. 1004:10-22 (Aresco).

25 ⁵⁷ Tr. 1034:10-1035:4.

26 ⁵⁸ Tr. 1037:1-8, 1044:9-12.

27 ⁵⁹ Tr. 1153:2-6; *see also* Tr. 1152:19-1153:14 (Scott) (It is “clear . . . that the vast majority of
 consumers think amateurism is a very important component of college sports.”).

28 ⁶⁰ Tr. 1167:6-10, 1172:6-17.

⁶¹ Tr. 1243:20-22.

⁶² Tr. 1094:22-1095:7.

Commissioner Scott's understanding about the appeal of amateurism is supported by studies he commissioned or received.⁶³ In 2014, for example, he had the Pac-12 survey one thousand consumers about their perceptions of the conference and of amateurism, to help develop policies and marketing approaches.⁶⁴ Nearly three-fourths of respondents, 71%, opposed paying student-athletes and agreed they "should remain amateurs," with only 29% saying that student-athletes "should be allowed to earn money" playing college sports.⁶⁵ Opposition to pay-for-play ranged from 60% (among the biggest fans) to 74% (among other fans).⁶⁶ But every demographic group evaluated, whether by geography or intensity of interest, showed greater opposition to paying student-athletes than support.⁶⁷

Not surprisingly, then, Commissioner Scott's understanding about the relationship between amateurism and consumer demand is not merely a personal opinion, but one of the business principles involved in his oversight of the Pac-12 Conference and the broadcasting of games, both on the conference's own Pac-12 Networks and through contracts with broadcast partners.⁶⁸ For example, consistent with Aresco's experience with CBS and ESPN, Scott explained that the Pac-12's third-party broadcast partners, ESPN and Fox, have discussed the appeal of amateurism in the context of contract negotiations, after deals closed, and during regular meetings with the Pac-12.⁶⁹ Likewise, Scott explained that amateurism appeals not only to broadcasters, but to sponsors too—many of whom "are very focused on Pac-12 athletics being a part of higher education and the fact that the student athletes are students and they're amateurs and they're . . . participating . . . as part of

⁶³ Tr. 1149:14-23, 1151:21-23, 1152:19-1153:14. One such study was provided to Commissioner Scott by Big Ten Commissioner Jim Delany. *See* Tr. 1147:10-1149:23; D0683. This was an abbreviated version of the same study about which Ohio State AD Gene Smith testified, D0239, described in detail *infra* at 15.

⁶⁴ Tr. 1153:22-1155:1; D0541-0002. As Mr. Scott explained, the survey was not designed to reach any particular result. Tr. 1165:1-1166:2.

⁶⁵ D0541-0009.

⁶⁶ D0541-0009. So-called "Big Fans" were slightly more likely to watch college sports on television than so-called "Somewhat Fans" (70% vs. 63%) and marginally more likely to attend games live (14% vs. 13%). D0541-0013.

⁶⁷ D0541-0009; *see also id.* at 0003 (reporting that "all audiences prefer student athletes to remain amateurs").

⁶⁸ Tr. 1090:24-1092:7.

⁶⁹ Tr. 1167:11-1168:16.

1 an overall educational journey that they're on," and want the academic aspect of college sports to be
2 reflected in their sponsorship.⁷⁰

3 c. Former NCAA Executive Vice President for Championships Mark Lewis

4 Mark Lewis testified to similar experience with consumer interest in amateurism. Based on
5 communications he has had with ticket buyers and other consumers as well as broadcast and media
6 partners, Lewis explained that the college sports "fans who create that consumer demand would feel
7 differently if college sports looked like professional sports."⁷¹ In fact, whereas "plenty" of fans have
8 expressed their desire to Lewis that student-athletes not be provided more than a scholarship and that
9 college sports not become a minor professional league, none has ever expressed a desire to pay
10 student-athletes.⁷² Maintaining a distinction between college sports and professional sports, in other
11 words, is important to maintaining consumer demand. Lewis also testified that if college sports were
12 professionalized, demand would fall because they would become a sort of minor professional league
13 but would never be able to compete with the "apex" professional sports leagues, like the NFL and
14 the NBA.⁷³ The professionals who play those sports are simply better players on the whole than
15 those playing college sports. And if fans want to watch, for example, professional football, most
16 will choose to watch the more talented players in the NFL.⁷⁴ By contrast, consumers are drawn to
17 college sports because the athletes are not playing for money, but "for the joy of competition"⁷⁵

18 d. The Ohio State University Athletic Director Gene Smith

19 In addition to witnesses at the NCAA and conference level, several non-party witnesses
20 testified about consumer demand for amateurism in college sports. For example, current Ohio State
21 AD, Gene Smith, testified that amateurism is "basic and core to what [college sports are] all about,"
22 namely, creating a sports product that is centered in academic education and personal development,

23 _____
24 ⁷⁰ Tr. 1129:16-1131:4, 1132:15-19.

25 ⁷¹ Lewis 30(b)(6) Tr. 64:17-65:12.

26 ⁷² Lewis 30(b)(6) Tr. 65:20-66:7.

27 ⁷³ Lewis 30(b)(6) Tr. 46:5-9, 97:15-98:12, 98:24-99:5, 99:19-25; *see also* Berst Tr. 71:6-16 ("[A]s
28 soon as you have a system that's pay for play, you have the developmental league in basketball
which isn't very successful").

⁷⁴ Lewis 30(b)(6) Tr. 101:3-14.

⁷⁵ Lewis 30(b)(6) Tr. 98:13-18.

1 which is “significantly different than the pro environment.”⁷⁶ Based on his interactions with
 2 collegiate donors and fans of college football and basketball, he testified that a “super majority are
 3 opposed to pay-for-play.”⁷⁷ Likewise, Smith’s experience with athletic sponsors echoes
 4 Commissioner Scott’s: many want to align themselves with the values particularly held by college
 5 sports fans, such as education and personal growth, and if universities paid student-athletes, some
 6 would stop sponsoring college sports.⁷⁸

7 In addition to his direct conversations with fans and sponsors, Smith testified that his views
 8 were confirmed by a consumer-demand study The Big Ten Conference commissioned to inform
 9 conference leaders about the fan base for college sports.⁷⁹ The participants in that study “indicated a
 10 clear preference for college over pro sports.”⁸⁰ That preference “is driven by the purity of the game
 11 and the passion of the athletes,” as demonstrated by their “playing for the love of the sport” and not
 12 “play[ing] for pay.”⁸¹ The Big Ten study further provided a detailed comparison of the “Perceptions
 13 of College vs. Pro Sports”.⁸²

21 ⁷⁶ Tr. 1394:20-1395:9. Aside from being Ohio State’s current athletic director, Mr. Smith is a
 22 former student-athlete, a first generation college student, former college football coach, and
 previously served as athletic director at three other NCAA Division I schools. Tr. 1377:10-21,
 1379:13-15, 1382:8-24, 1383:13-24, 1384:13-16, 1385:12-15, 1387:9-13.

23 ⁷⁷ Tr. 1406:24-1408:14.

24 ⁷⁸ Tr. 1420:22-1422:1 (Smith).

25 ⁷⁹ Tr. 1412:15-1413:23, 1418:4-20, 1419:18-22, 1416:24-1417:3. The study consisted of six focus
 groups conducted in three major markets across the country, specifically chosen because they were
 26 representative of multiple major conferences. D0239-0003. Only fans who regularly attended or
 watched college sports participated in the focus groups. *Id.*

27 ⁸⁰ *Id.* at 0004.

27 ⁸¹ *Id.*

28 ⁸² *Id.* at 0011.

College Sports	Professional Sports
<ul style="list-style-type: none"> • “For these individuals, college sports represented the purest form of the sport - playing for the love of the game, sportsmanship and teamwork.” • “College athletes also seem to develop more personal connections with the university and community.” • “College athletes develop loyalties to the university and community that last a lifetime. In fact, many of these loyalties are passed on to their children.” 	<ul style="list-style-type: none"> • “[P]ro sports are believed to be more about money and individuals.” • “Many believe for the pro athlete the game has become a job and playing for the love of the game has unfortunately become a distant second.” • “[I]n pro sports a player may only play for a team for a few years before being traded. This makes it difficult to develop personal connections with a team or city.”

These contrasting perceptions highlight not only the importance of amateurism in distinguishing college sports from professional sports, but also that “a connection between the fan and the student” is *promoted* by the non-professional character of the student-athlete’s participation in college sports.⁸³ As Smith explained, while collegiate athletes are less polished than professionals, college sports fans enjoy that they are playing not for money but as part of their education and personal development. By contrast, in professional sports the fans are attracted because of the polished nature of the game and the environment, as well as the superior skill of the athletes.⁸⁴ Smith testified that paying student-athletes would change the nature of that relationship; fans would “feel differently about the game and feel differently about the student athletes that they come to see.”⁸⁵ The connection to student-athletes is particularly important for current and former students, and school faculty and staff, which represent a significant percentage of college sports fans.⁸⁶

⁸³ Tr. 1419:23-1420:12 (Smith); *see also* D0239-0011 (fans have a “greater sense of connection to college athletics” in part because student-athletes “seem to develop more personal connections with the university and community”).

⁸⁴ Tr. 1393:15-1394:11.

⁸⁵ Tr. 1408:15-1410:13.

⁸⁶ At Ohio State, for example, roughly 102,000 people can attend a football game. Nearly half of those in attendance at any given football game are *current* students (30,000, or 29%) and university faculty and staff (15,000, or 15%), and that is not even counting *former* Ohio State students. Tr. 1396:20-25, 1411:9-13, 1453:10-12 (Smith).

e. University of Wisconsin at Madison Chancellor Rebecca Blank and Wake Forest University President Nathan Hatch

The top officers of two other universities—Chancellor Rebecca Blank and President Nathan Hatch (who formerly served as the Provost of the University of Notre Dame)—similarly explained how the consumer appeal of college sports is intertwined with the educational mission of the schools that sponsor them. Chancellor Blank testified that if student-athletes were paid to play, *i.e.*, given more than their educational expenses and benefits incidental to participation, it would negatively affect consumer demand.⁸⁷ In almost none of her conversations with alumni or community members has anyone expressed support for paying student-athletes.⁸⁸ Dr. Hatch similarly testified that “amateurism contributes to the demand for college athletics” and “is critical to the kind of model” universities espouse.⁸⁹ Alumni and other donors contribute to universities for many reasons, but one reason is an “attachment” to the “amateur model of athletics.”⁹⁰

Chancellor Blank also echoed Mr. Smith in explaining that a “sense of connection” between fans and student-athletes is fostered if the former identify with the latter “as representatives of their school, as students like [the fans] were” and that these connections foster consumer demand.⁹¹ Dr. Hatch likewise agreed that part of the appeal of collegiate sports is that student-athletes are “students like others who go through similar paths” and are “not being paid to play.”⁹² Paying student-athletes would disrupt the relationships between them and the campus community because faculty and non-athlete students expect all student-athletes to be non-professional students.⁹³

Chancellor Blank noted as well that students in particular “love seeing their fellow students out there playing,”⁹⁴ and have a “sense of connection with them as a fellow student.”⁹⁵ Alumni similarly watch college sports and “see[] themselves at a younger age,” which gives them a

⁸⁷ Tr. 954:8-25.

⁸⁸ Tr. 864:12-16.

⁸⁹ Tr. 1978:25-1979:8, 1991:5-1993:13.

⁹⁰ Tr. 1987:13-1989:16 (Hatch).

⁹¹ Tr. 869:18-870:2, 947:8:16.

⁹² Tr. 1991:24-1992:4.

⁹³ Tr. 2001:3-12 (Hatch).

⁹⁴ Tr. 868:23-869:6.

⁹⁵ Tr. 949:9-950:6.

1 “particular pride” in college sports.⁹⁶ If college athletes were paid to play, “the identification of
 2 students with this as part of the team, as one of them, would be less,” as would both “the support of
 3 . . . alumni for the students” and “support of the leadership at [the] university, given [the] core
 4 mission . . . is an educational mission”⁹⁷

5 2. *Dr. Isaacson’s Survey Further Demonstrates Consumer Demand for Amateur*
 6 *College Sports*

7 Dr. Bruce Isaacson’s survey “provid[es] valid and reliable evidence confirming that
 8 amateurism is an important reason for the popularity of college sports” and “that amateurism is
 9 important in consumers’ decisions to watch or attend college sports”⁹⁸ As Dr. Isaacson
 10 explained, two aspects of that survey, in particular, support the conclusion “that there is a
 11 relationship between amateurism and consumer demand”: first, the responses to his question asking
 12 respondents why they watch or attend college sports, and the second, responses to his questions
 13 about the so-called unlimited-payments scenario, where (as the name suggests) there would be no
 14 limits on the payments that could be made to student-athletes.⁹⁹

15 ⁹⁶ Tr. 869:7-870:2 (Blank).

16 ⁹⁷ Tr. 954:8-25 (Blank); *see also* Tr. 1454:2-15 (Smith). Plaintiffs criticize Defendants for
 17 proffering lay opinions from only “a handful of witnesses cherry picked by Defendants.” Pls.’
 18 Closing at 14. This argument is completely unfounded. This Court has already recognized, “based
 19 on the sheer scope of this case, that the presentation of live testimony necessarily would have to be
 20 limited and streamlined.” Dkt. 1119 at 3. That is because the “universe of potential witnesses in this
 21 action is extraordinary. Division I has 351 member schools, each with a president and staff in
 22 several relevant departments; and thirty-two conferences, each with a commissioner and staff.” *Id.*
 23 at 3-4. “Because the universe of potential witnesses in this case runs to the thousands, it would not
 24 have been possible for either side to present live testimony by every witness with knowledge or
 25 opinions on the subject.” *Id.* at 13. Defendants, therefore, called witnesses from a cross-section of
 26 conferences and universities that was, as the Court described it, “representative” of the institutions
 27 not present at trial. *Id.*

28 ⁹⁸ Isaacson Dir. Test. ¶¶ 24, 26, 160; *see also id.* ¶ 13 (“The results . . . demonstrate that: (i)
 amateurism is an important reason why consumers watch college Division I football and basketball;
 (ii) a substantial portion of college sports fans oppose providing to student-athletes additional
 compensation and benefits, beyond the cost of attendance, tested in [the] survey; and (iii) a majority
 of consumers oppose providing student-athletes with unlimited payments”).

⁹⁹ Tr. 1947:21-25. Dr. Isaacson’s survey is the only survey in evidence that measured consumers’
 current views on amateurism, as opposed to what might happen in a but-for world where some
 NCAA rules were eliminated. Plaintiffs’ expert, Hal Poret, repeatedly made clear that the purpose of
 his survey was to examine hypothetical changes to the NCAA rules that would provide “additional
 forms of compensation or benefits that are not currently permitted by the challenged NCAA rules”
 and to “measure[] the potential *impact on consumer viewership/attendance*” of those hypothetical
 changes. Poret Dir. Test. ¶ 6 (emphasis in original); *see also, e.g., id.* ¶¶ 2, 18, 22, 25, 134; Tr.
 1773:3-11 (“The assignment was to determine whether there are some forms of compensation or
 (cont.)

a. Consumers Watch and Attend College Sports Because They Are Played by Amateurs

Not only do the NCAA's amateurism rules promote demand for college sports, a significant percentage of consumers expressly recognize the athletes' amateur status as a reason why they watch or attend. Dr. Isaacson asked consumers: "Which of the following, if any, are reasons why you watch or attend [college sports] games," giving them 14 substantive possible answers, including "another reason not listed above."¹⁰⁰ "Almost one-third (31.7%) of the respondents in [the] survey answered that they watch or attend college sports because they 'like the fact that college players are amateurs and/or are not paid.' This was the third-most-commonly selected reason."¹⁰¹

These data are unrefuted—and certainly not addressed by the survey of Plaintiffs' expert, Mr. Poret. While he asked consumers "Which of the following, if any, are reasons why you watch" college sports, Mr. Poret did not offer respondents the option of selecting the amateur or unpaid status of athletes, despite the fact that it is the central issue in this case.¹⁰²

With no evidence of their own on the question, Plaintiffs strain to dismiss the data Dr. Isaacson gathered, arguing that his phrase "amateurs and/or are not paid" "made it impossible to determine whether respondents choosing this response did so merely because they liked the fact that

benefits that go beyond what is currently permitted that could be offered without having there be a negative impact on consumer demand for the college sports at issue.").

Mr. Poret's opinions likewise address only what he believes *might* happen in a but-for world where "additional forms of compensation/benefits . . . could be offered" Poret Dir. Test. ¶ 57; *see also, e.g., id.* ¶¶ 59, 129; Tr. 1790:14-20 (describing his "bottom line conclusion" as "there are some scenarios in which conferences or colleges could offer additional compensation without having a negative impact on consumer demand"). Mr. Poret did not assess existing consumer demand under the current NCAA rules.

¹⁰⁰ Tr. 1965:23-1966:4; Isaacson Dir. Test. ¶ 132.

¹⁰¹ Isaacson Dir. Test. ¶ 24; *see also* Tr. 1903:19-23, 1904:14-19 (Isaacson) (amateurism's ranking as third most important among college sports fans demonstrates its value, relative to the other reasons for watching/attending included in Dr. Isaacson's survey question).

¹⁰² Poret Dir. Test. ¶¶ 78, 79; Tr. 1661:18-1662:13; Isaacson Dir. Test. ¶¶ 86, 88. As Dr. Isaacson explained, this question plays no role in Mr. Poret's opinions in this case. Its only purpose appears to be to "prime[]" respondents to give answers more favorable to Plaintiffs when responding to the subsequent scenarios . . . because the omission of amateurism from the list of possible reasons why respondents watch college sports would have encouraged respondents to think about and focus on reasons why they are fans of college sports *other than* amateurism." *Id.* ¶ 89; *see also id.* ¶ 90 ("Mr. Poret's . . . disregard of amateurism early in his survey may have artificially depressed consumers' opposition to the later scenarios as well as their predictions that the scenarios would cause them to watch or attend the sports less often.").

the athletes are students without regard to whether they are also ‘paid’¹⁰³ This effort to create an artificial distance between the word “amateur” and its definition (“not paid”) and to suppose that respondents would not have given the commonplace word “amateur” its ordinary meaning—the one Dr. Isaacson provided and the one the Ninth Circuit used in *O’Bannon*—namely, “not paid”¹⁰⁴—has no basis. Unsurprisingly, Plaintiffs have provided *no* evidence (or logic) to support this highly counterintuitive supposition. And Dr. Isaacson’s survey results demonstrate that respondents understood the common definition of amateurism to apply since 85% of respondents who testified that they watch college sports because they are played by amateurs also opposed the Unlimited Payments scenario.¹⁰⁵ Because “amateur” is functionally synonymous with “not paid,” it does not matter whether a respondent selected the response based on one term or the other.¹⁰⁶

Plaintiffs also try to dismiss these data on the ground that respondents who indicated they watch college sports because they are played by amateurs also indicated there were other reasons for their viewership.¹⁰⁷ But, in *O’Bannon*, the Ninth Circuit already rejected that view as a matter of common sense and law; even if the “district court was not persuaded that amateurism is the *primary* driver of consumer demand for college sports,” it was enough that “the NCAA’s ‘current understanding of amateurism’ plays *some role* in preserving ‘the popularity of the NCAA’s product.’”¹⁰⁸ Dr. Isaacson’s survey evidence unquestionably shows at least that much.

b. Consumers Oppose Unlimited Payments to Student-Athletes

Consumers’ negative responses to Dr. Isaacson’s questions about the Unlimited Payments scenario likewise show that many consumers are attracted to amateurism in college sports.¹⁰⁹ That

¹⁰³ Pls.’ Closing at 10; *see also* Poret Dir. Test. ¶ 146; Poret Reb. Test. ¶ 6 n.5.

¹⁰⁴ Isaacson Dir. Test. ¶ 155; *see also O’Bannon*, 802 F.3d at 1076 (“not paying student-athletes is *precisely what makes them amateurs*” (emphasis in original)).

¹⁰⁵ Tr. 1967:16-23 (Isaacson).

¹⁰⁶ Isaacson Dir. Test. ¶ 156.

¹⁰⁷ Pls.’ Closing at 10-11.

¹⁰⁸ 802 F.3d at 1059 (second emphasis added); *see also O’Bannon*, 7 F. Supp. 3d at 977 (finding that “the NCAA’s restrictions on student-athlete compensation are not the driving force behind consumer demand for FBS football and Division I basketball-related products” and that “consumers are interested in college sports for other reasons”); Isaacson Dir. Test. ¶ 157; Tr. 1966:5-15 (Isaacson).

¹⁰⁹ Tr. 1967:5-9 (Isaacson).

1 scenario asked whether respondents were in favor of or opposed to changing NCAA rules such that
 2 “a college could pay a student-athlete any amount it wanted to, without any limit, for playing college
 3 sports.”¹¹⁰ “In total, the gross percentages of respondents opposed to and in favor of the [Unlimited
 4 Payments] scenario were 68.5% and 19.8%, respectively. After accounting for the survey control,
 5 59.7% of respondents were opposed, compared with 0.1% in favor.”¹¹¹ These data are unrefuted, as
 6 Mr. Poret did not test the possibility of uncapped compensation or payments in a free and open
 7 market, even though Plaintiffs seek an injunction that would eliminate all of the NCAA’s caps on
 8 student-athlete compensation.¹¹²

9 Dr. Isaacson testified that these results support his opinion on the importance of amateurism
 10 to college sports for two independent reasons.¹¹³ First, Dr. Isaacson tested this scenario because it
 11 “specifically tests whether amateurism is related to consumer demand,”¹¹⁴ since the possibility of
 12 unlimited payments is, as Dr. Isaacson described, “the polar opposite of amateurism.”¹¹⁵ Survey
 13 respondents expressed “very high rates of opposition to that particular scenario,”¹¹⁶ which
 14 demonstrates consumers’ support for the principle of amateurism. These results—showing roughly
 15 70% of respondents opposing a scenario where there were no rules limiting what a college could pay
 16 student-athletes—reinforced testimony by Commissioners Scott and Aresco, whose views on
 17 amateurism had been shaped by additional survey data likewise demonstrating around 70%
 18 opposition to paying student-athletes.¹¹⁷ Based on his extensive experience in marketing, Dr.

19
 20 ¹¹⁰ Isaacson Dir. Test. ¶ 126.

21 ¹¹¹ Isaacson Dir. Test. ¶ 25.

22 ¹¹² Tr. 1693:11-15, 1696:8-19, 1766:20-1767:21 (Poret); Isaacson Dir. Test. ¶ 124; Requested
 23 Injunction (Pls.’ Op., App’x C ¶ 1) (“Defendant National Collegiate Athletic Association . . . [is]
 24 hereby permanently restrained and enjoined from maintaining . . . any . . . rule . . . that fixes or limits
 25 compensation or benefits available from schools or conferences to Division I women’s and men’s
 26 basketball and FBS football athletes in consideration for their athletic services.”).

27 ¹¹³ Tr. 1967:5-12.

28 ¹¹⁴ Tr. 1913:14-16 (Isaacson).

¹¹⁵ Tr. 1915:2-5, 1915:18-24.

¹¹⁶ Tr. 1967: 12-15 (Isaacson).

¹¹⁷ Tr. 1167:6-10, 1172:6-17 (Scott) (Pac-12 survey consistent with his views on amateurism);
 D0541-0009 (Pac-12 Survey) (“Most of the general population (71%) thinks that college athletes
 already receive enough benefits and should not be paid.”); Tr. 1044:9-12 (Aresco) (“I have seen a
 study that showed that 71 percent . . . of the public does not believe players should be paid.”).

Isaacson opined that “you wouldn’t want to change a product, in fact, a product that’s your only product, when . . . more than half of your consumers oppose that change.”¹¹⁸

Second, Dr. Isaacson testified that there was “very good correspondence” between responses to the Unlimited Payments scenario and the question asking why respondents watch or attend college sports. A large majority of respondents who testified that they watch college sports because they are played by amateurs (85%) also opposed the Unlimited Payments scenario.¹¹⁹ This correspondence demonstrates that the two measures both support the same concept—the relationship between amateurism and consumer demand.¹²⁰ Together, they show that college sports fans both watch college sports because student-athletes are not paid *and* oppose unlimited pay-for-play at levels that both survey experts in this case agree demonstrate a significant result.¹²¹

C. The Challenged Rules Promote the Integration of Academics and Athletics

The evidence at trial also demonstrates that the challenged restraints promote integration, a second and independent procompetitive justification that was recognized by this Court and the Ninth Circuit in *O’Bannon* and should again be recognized here. Despite Plaintiffs’ assertion to the contrary, this Court recognized in *O’Bannon* and the Ninth Circuit affirmed that integrating student-athletes into their academic communities is a legitimate procompetitive objective because it “improve[s] the schools’ college education product.”¹²² Moreover, like amateurism, academic integration itself plays a role in preserving consumer demand for college sports.

Although Defendants need not prove that student-athletes are perfectly integrated, the record demonstrates that the challenged restraints promote integration in at least two ways. First, not paying student-athletes incentivizes student-athletes to retain a focus on academics. Second, paying

¹¹⁸ Tr. 1964:18-21.

¹¹⁹ Tr. 1967:16-23 (Isaacson).

¹²⁰ Tr. 1968:11-18 (Isaacson).

¹²¹ Tr. 1967:5-23, 1968:19-25 (Isaacson) (fact that “over a quarter of the population of Division I sports fan[] respondents in [the] survey said that they watch because of amateurism and opposed the Unlimited Payment scenario” is “evidence of the relationship between amateurism and consumer demand”); Tr. 1716:8-1717:11 (Poret) (responses of less than 10% are insignificant, but responses of 15% or more are typically sufficient to demonstrate a significant result).

¹²² *O’Bannon*, 7 F. Supp. 3d at 980; *O’Bannon*, 802 F.3d at 1072.

1 student-athletes would further distinguish them from their peers and create a wedge between student-
2 athletes and the broader school community and also among different student-athletes.

3 1. *Division I Members Seek to Ensure that Student-Athletes Are Integrated*

4 The core missions of universities undeniably are educational, and universities are achieving
5 their educational missions with respect to student-athletes under the existing collegiate model.¹²³ As
6 Chancellor Blank testified, the basic missions of the university are education and research, and
7 everything the university does must fit into one of those missions.¹²⁴ Athletics are a central part of
8 the university's educational mission, not a business intended to increase profits.¹²⁵ Intercollegiate
9 athletics are key to student-athlete development, teaching student-athletes valuable lessons in
10 teamwork, leadership, discipline, grit, and how to cope with success and failure.¹²⁶ Indeed, the
11 evidence at trial demonstrated that many student-athletes recognize the importance of academics in
12 their overall university experience, selecting schools based on academic reputation and putting
13 academics before athletics.¹²⁷

14 ¹²³ See Heckman Dir. Test. ¶ 66. Despite Plaintiffs' insinuation that there is some "business of D-I
15 basketball and FBS football" separate from universities' overall educational mission, Pls. Op. at 1,
16 college sports are "a key part of [their] educational enterprise." Tr. 1982:1-11 (Hatch). Universities
17 sponsor athletics (often at great economic loss) because they provide "an opportunity for students
18 who otherwise might not go to a quality university" and because "the educational experience itself"
19 that comes from participation in athletics is "important." Tr. 1982:12-1983:22 (Hatch). Even Dr.
Noll agreed that "universities don't have college sports to make money in and of itself, they have it
to attract student-athletes" and "to please important constituencies, primarily students." Tr. 275:10-
13, 276:5-20; see also Tr. 278:18-22 (Noll) ("The business of colleges is to attract students and . . .
research grants. And so doing things that attract students is part of the business model.").

¹²⁴ Tr. 874:10-13.

20 ¹²⁵ Tr. 874:14-17 (Blank); Tr. 1392:21-1393:20 (Smith); see also Tr. 1390:16-1391:25 (Smith)
21 (explaining that Ohio State sponsors 36 sports because the university believes in the educational
22 experience of intercollegiate athletics); Tr. 1982:5-11 (Hatch) (Wake Forest participates in 16 varsity
23 sports, not to generate income, but because intercollegiate athletics "is a key part of [the
24 university's] educational enterprise" and is "critical to [the university's] educational mission."). Dr.
Noll's testimony likewise reveals that the "vast majority [of colleges and universities] sponsor teams
with no expectation of generating revenue," and that most Division I athletic programs lose
money. Tr. 275:14-276:4, 278:3-13. Instead, "[u]niversities have comprehensive varsity athletic
programs largely because students want to be athletes" and "want to have the academic experience
and the athletic experience." Tr. 277:13-20 (Noll).

25 ¹²⁶ Tr. 1983:11-22 (Hatch). For example, Plaintiff Justine Hartman testified that she learned a lot
26 from her experience as a student-athlete, including principles of teamwork, how to bounce back from
27 a loss, and leadership skills, which will help her in the future. Tr. 825:24-827:3; see also Tr.
1392:14-17 (Smith) ("Your experience and the group dynamics of athletics provides you with some
intangible characteristic growth that other students don't have.").

28 ¹²⁷ Tr. 263:7-265:9 (Noll). For example, Plaintiff Shawne Alston testified that West Virginia
(cont.)

Consistent with their educational missions, Division I universities take significant steps to ensure that student-athletes are integrated into the broader university communities.¹²⁸ For example, Chancellor Blank testified that student-athletes at the University of Wisconsin-Madison have more than 90 different majors, do not live in athlete-only dorms, participate in the same freshmen orientation as their non-athlete peers, and attend classes with non-athletes.¹²⁹ Similarly, student-athletes at Ohio State are not clustered in certain majors, are required to live on campus for two years like all other students, do not live in separate student-athlete-only dorms, and eat in the same dining halls as non-athlete students.¹³⁰ Likewise, student-athletes at Notre Dame and Wake Forest live in the same dorms and eat in the same dining halls, attend the same classes, and otherwise engage in the same campus communities as non-athlete students.¹³¹

Results from the NCAA's Growth Opportunities, Aspirations and Learning of Students in college (GOALS) studies confirm that that schools' integration efforts produce positive results.¹³² Among other results, a recent such study shows that (i) 69 to 81% of Division I student-athletes confirmed that they have a sense of belonging on campus; (ii) 93% of respondents stated their college athletic experiences had a positive or very positive impact on their "personal responsibility" skills; and (iii) 69% of student-athletes in the relevant sports reported that some of their closest friends were not their teammates.¹³³

University's criminal justice program was "one of the biggest things" he considered in choosing a school, Tr. 669:24-670:4, and Plaintiff Martin Jenkins testified that he was interested in the right balance of academics and athletics, and the quality of education was important to him, Tr. 770:11-771:6. Plaintiff Justine Hartman also explained that she was looking for a school that was good at athletics and academics. Tr. 795:21-24; *see also* Jemerigbe Tr. 58:24-59:8 (describing the opportunity to get "a really good education" as one of two equal criteria); Kindler Tr. 40:13-20, 52:7-53:21 (listing the courses of study and campus traditions as central to his decision-making process).

¹²⁸ *See, e.g.*, Alger Tr. 111:11-113:8.

¹²⁹ Tr. 887:4-25, 888:22-889:13.

¹³⁰ Tr. 1398:12-1399:7, 1451:16-18 (Smith). In addition, a member of Ohio State's football team recently created a student organization to develop stronger relationships between African American student-athletes and African American non-athlete students. Tr. 1397:13-1398:11 (Smith).

¹³¹ Tr. 1997:8-22 (Hatch).

¹³² P0059-0011; Tr. 946:5-8 (Blank). Whether student-athletes have a sense of belonging at their colleges is one way to look at integration. Tr. 945:24-946:4 (Blank).

¹³³ P0059-0011, 0013, 0048; Tr. 1818:17-1819:2, 1819:11-1820:17 (Petr). Results from the NCAA Study of College Outcomes and Recent Experiences (SCORE) similarly confirm that the vast

(*cont.*)

Division I schools also fulfill their core educational missions by supporting student-athletes academically, providing a variety of resources designed to help student-athletes succeed in their demanding academic environments. The collegiate model helps schools achieve their educational missions and encourages universities to invest in academic opportunities for student-athletes, which in turn benefits student-athletes.¹³⁴ For example, Plaintiff Martin Jenkins testified that he was provided academic support and attended over 430 tutoring sessions for free, which helped him succeed academically.¹³⁵ Plaintiff John Bohannon described some of the resources his schools employed to push for student-athlete academic achievement, including mandatory study hall, tutoring appointments, and weekly meetings with an academic advisor.¹³⁶ Student-athletes at Ohio State similarly are provided significant academic support, including academic advice, tutors, and learning specialists.¹³⁷ And as Ms. Hartman explained in a promotional video for the women's basketball team at the University of California at Berkeley, student-athletes "are set up to not fail."¹³⁸

Trends in graduation rates demonstrate universities' success in helping student-athletes graduate and obtain degrees under the collegiate model.¹³⁹ As of 2017, the federal graduation rate

majority of former student-athletes are satisfied with their collegiate experiences. For example, 82% of respondents indicated that they were satisfied or completely satisfied with their overall experiences, 68% with their athletic experiences, 69% with their academic experiences, and 77% with their social experiences. Tr. 1828:15-24 (Petr).

¹³⁴ Heckman Dir. Test. ¶ 66.

¹³⁵ Tr. 777:7-15, 781:6-782:4.

¹³⁶ Bohannon Tr. 71:6-74:5.

¹³⁷ Tr. 1388:8-1389:10, 1438:14-1440:8 (Smith). Ohio State spends approximately \$250,000 on tutors for student-athletes each year. Tr. 1438:25-1439:1 (Smith). It also provides significant support to help student-athletes get jobs after college, including career-development programs, internship programs, and study abroad programs. Tr. 1454:19-1455:16 (Smith) ("[W]e really try our best to work with them individually and have an individual plan to help them identify what they want to do and get them ready for that."). Of the 221 graduating student-athletes at Ohio State last spring, 76% had jobs by the time of graduation and that figure has since risen to 84%. Tr. 1455:23-1456:4 (Smith). The university also has a degree-completion program whereby athletes who leave before graduating to play sports professionally can come back afterwards to complete their degrees. Tr. 1456:5-12 (Smith).

¹³⁸ D0802-0004; *see also id.* ("As far as like, you know, getting in homework and stuff like that, I mean we have this great tutor so, like, that helps. Like my tutor is really like, on top of me consistently. So it's pretty easy, honestly.").

¹³⁹ *See* J0018 (Trends in GSR and Federal Graduation Rates at DI Institutions).

1 was higher for men’s basketball and women’s basketball student-athletes than their comparable non-
 2 athlete cohorts.¹⁴⁰ In fact, between 1991 and 2017, the federal graduation rate for student-athletes
 3 increased 16%, including increases across all subgroups for football and men’s and women’s
 4 basketball.¹⁴¹ These trends are consistent with the expert analysis of Dr. Heckman, whose empirical
 5 work on the human capital benefits of amateur athletics demonstrates that “student-athletes have
 6 received substantial academic and labor-market benefits under the Collegiate Model.”¹⁴²

7 Despite all this, Plaintiffs downplay the integration justification by claiming “Defendants
 8 cannot even prove that D-I basketball and FBS football players are currently well-integrated,”
 9 followed by a litany of anecdotes about the tensions and trade-offs that exist for student-athletes.¹⁴³
 10 But such complaints that athletes are not “well-integrated,” while incorrect to begin with, also miss
 11 the point. The issue is not whether schools have achieved an ideal level of student-athletes’
 12 integration, but whether the challenged rules are rationally crafted to help strike appropriate balances
 13 so existing tensions and trade-offs do not unreasonably undermine academics. Integrating student-
 14 athletes into the student body does not mean that these tensions and trade-offs disappear, any more
 15 than integration means that all students (athletes or not) will have the same college experience. To
 16 the contrary, the tensions and trade-offs that Plaintiffs bemoan underscore the reason there is a need
 17 for the NCAA to establish rules promoting integration. And these rules are economically
 18 procompetitive if they improve the quality of collegiate offerings by helping to integrate athletics
 19 into the broader student experience, reducing tensions or fragmentation that might otherwise exist or
 20 be worse.

23 ¹⁴⁰ J0018-0040; Tr. 1811:16-25 (Petr); *see also* Heckman Dir. Test. ¶ 52 (“Intercollegiate varsity
 24 athletes are as likely or more likely to earn at least a Bachelor’s degree relative to comparable non-
 athletes.”).

25 ¹⁴¹ J0018-0043; Tr. 1813:8-18 (Petr).

26 ¹⁴² Heckman Dir. Test. ¶ 26; *see also id.* ¶ 11 (“The current Collegiate Model contributes to the
 27 balance of incentives for students to spend time both on athletics and academics. Specifically, . . .
 there are substantial benefits to participation in high school athletics and college athletics and to
 participation in NCAA Division I basketball and FBS football in particular. For members of
 28 disadvantaged groups in particular, this is of key importance.”) (internal citations omitted).

¹⁴³ Pls.’ Closing at 18 (capitalization altered).

Plaintiffs also focus on student-athletes' demanding schedules. But even putting aside that Plaintiffs ignore the important life lessons student-athletes learn about how to balance and manage busy schedules and competing demands, the NCAA, conferences, and individual schools have taken steps to ensure that student-athletes have sufficient time to devote to academics and life outside the classroom.¹⁴⁴ Defendants do not "sell out their putative integration goals by surrendering control over scheduling games to broadcasters," as Plaintiffs suggest.¹⁴⁵ Rather, many conferences, such as the Pac-12 and SEC, have scheduling parameters designed to minimize the impact of playing games on student-athletes' academic schedules.¹⁴⁶ And there are new bylaws addressing time demands, including one prohibiting official athletics-related activity during an eight-hour period every night.¹⁴⁷ Further, as Commissioner Scott explained, "the majority of student athletes do not want to spend less time on athletics."¹⁴⁸

2. *The Challenged Rules Promote Integration*

The evidence at trial demonstrates that the challenged rules promote the integration between academics and athletics in at least two ways:¹⁴⁹ (1) they incentivize student-athletes to not focus

¹⁴⁴ See, e.g., Tr. 888:1-18 (Blank); Henry 30(b)(6) Tr. 48:5-50:19 (discussing Mountain West Conference policies to ensure that the schedule is "not impacting negatively student athlete missed class time").

¹⁴⁵ Pls.' Closing at 19.

¹⁴⁶ See, e.g., Lindberg 30(b)(6) Tr. 23:1-16, 27:5-12, 27:19-23, 29:2-8; D0696 at 0003-0007; see also MacLeod 30(b)(6) Tr. 154:3-14 ("When we get to windows for broadcasts, we've put some time parameters on there so they don't start too late or too early. Days of play have been discussed in football. Our members have chosen not to play midweek games other than Thursday, Friday, and the traditional Saturday.").

¹⁴⁷ Tr. 1229:12-24; J0024-0262 (NCAA Bylaw 17.1.7.10.6.1); see also *id.* at 0260 (NCAA Bylaws governing required days off); Emmert Tr. 209:15-210:17, 212:8-214:9, 215:2-22 (describing proposals to reduce time demands).

¹⁴⁸ Tr. 1225:2-6 (Scott). Commissioner Scott explained that Pac-12 student-athletes "view themselves as elite academically as well as athletically. They want the best of all worlds. That's why they attend our schools." Tr. 1225:6-8. It is "not unusual" for students who are very passionate about what they do to spend a significant amount of time on their craft, whether it's engineering students who are conducting research or musicians and dancers who want to get to the next level or reach their peak. Tr. 1225:20-25 (Scott). And "if anyone is spending 50 hours on their sport, a significant portion of those hours are voluntary, they are choosing to do it." Tr. 1227:11-15 (Scott).

¹⁴⁹ As explained above, Defendants need not prove that the challenged restraints, alone, *cause* integration, as Plaintiffs claim. *O'Bannon*, 802 F.3d at 1081; see also *O'Bannon*, 7 F. Supp. 3d at 1004-05.

1 exclusively on athletics, but to also focus on academics, and (2) they decrease the wedge that would
 2 otherwise exist between student-athletes and the rest of the student body and among student-athletes.

3 a. The Rules Incentivize Student-Athletes to Focus on Academics

4 Under the current collegiate model, a balance of incentives is struck to encourage student-
 5 athletes to succeed both academically and athletically.¹⁵⁰ This is because amateurism “fosters
 6 incentives to study as well as participate in athletics, and experience the social and emotional
 7 benefits of college life with classmates,” which in turn improves the college-education product
 8 universities offer student-athletes.¹⁵¹ As Plaintiff Nigel Hayes explained in his mock
 9 commencement speech, he grew “intellectually and spiritually” while in college and that “[o]ne of
 10 the best things about Wisconsin is that you’ve got thousands of students from different backgrounds
 11 and they all want to debate ideas.”¹⁵² Mr. Hayes thanked all of his “classmates, teammates, coaches,
 12 professors and friends for being part of a community that [he] will always be grateful for.”¹⁵³

13 Plaintiffs’ proposed removal of the NCAA’s financial-aid rules would be a “radical change”
 14 that would likely lead to “substantial changes” in student-athlete incentives.¹⁵⁴ Paying student-
 15 athletes would “change[] the nature of the student/teacher relationship,” and would “change[] the
 16 whole goal” of that balance under the existing rules.¹⁵⁵ Dr. Heckman explained that if substantial
 17 sums of money hinged on student-athletes’ athletic performance, they would inevitably be
 18 incentivized to devote more time to athletics.¹⁵⁶

19
 20 ¹⁵⁰ Heckman Dir. Test. ¶ 13; *see also id.* ¶ 63 (“My empirical work provides evidence that incentives
 for student-athletes to succeed both academically and athletically are in place and effective under the
 Collegiate Model.”).

21 ¹⁵¹ Heckman Dir. Test. ¶ 26; *see also, e.g., id.* ¶¶ 65-71.

22 ¹⁵² D0719-0007 (“I remember more than a few times when I found myself walking behind groups of
 students walking around campus just to listen in on their political conversations.”). Mr. Hayes
 23 knows that the University of Wisconsin “made [him] a better student, athlete and person.” D0719-
 0011.

24 ¹⁵³ D0719-0011.

25 ¹⁵⁴ Heckman Dir. Test. ¶ 12.

26 ¹⁵⁵ Tr. 624:1-8 (Heckman).

27 ¹⁵⁶ Heckman Dir. Test. ¶¶ 11-13, 67-68, 89, 92-94; *see also* Tr. 505:21-506:17 (Elzinga) (Pay-for-
 play can lead to perverse incentives “because the student-athlete may move into other types of
 academic endeavors that are rewarded basically because the grades are easy, as opposed to majoring
 in economics at Stanford, which is a substantive major.”). *See also* Tr. 1469:25-1470:4 (Smith)
 28 (“the pay-for-play model . . . would have a significant impact on our ability to ensure that the
 (cont.)

1 This would be the case even if student-athletes were paid for obtaining a certain GPA or
 2 progressing toward a degree.¹⁵⁷ Plaintiffs contend that “[i]f Defendants were truly concerned that
 3 above-COA payments would cause athletes to focus less on academics, then they could tie such
 4 compensation to grades and/or graduation.”¹⁵⁸ One fallacy of this suggestion is that it equates
 5 “grades” with “education,” whereas “in academia one is trying to gain knowledge, not just
 6 grades.”¹⁵⁹ As Dr. Heckman testified, pay for GPA or progress toward a degree may have a negative
 7 impact on learning: “It’s one of the internal rules of incentive models, that you will try to achieve
 8 that objective at lowest cost, which might be taking easier courses, courses that don’t have the same
 9 content as the other kinds of courses.”¹⁶⁰

10 To support his expert opinion that “forming the incentive is a delicate task,”¹⁶¹ Dr. Heckman
 11 cited to an article co-authored by Roland Fryer.¹⁶² Contrary to Dr. Noll’s assertions, this article
 12 supports Dr. Heckman’s opinions, and Dr. Heckman did not make “broad generalizations about [the
 13 authors’] results.”¹⁶³ Rather, Dr. Heckman cited the article as an example of the “large academic
 14 literature in the economics of education that shows that paying for grades and incentivizing students
 15 has had either a zero or negative effect, especially for low-ability students.”¹⁶⁴ Dr. Elzinga also
 16 testified regarding this economic principle, explaining that pay for GPA could establish perverse
 17 incentives so that a student would decide to take a less desirable curriculum because the payment for
 18 GPA in a different major would be beneficial financially to the student, but might not enhance the
 19 academic quality of the education.¹⁶⁵

20 behavior of our student athletes maintains their focus on their academics.”).

21 ¹⁵⁷ Tr. 1469:18-1470:4 (Smith).

22 ¹⁵⁸ Pls.’ Closing at 23.

23 ¹⁵⁹ Tr. 624:1-8 (Heckman).

24 ¹⁶⁰ Tr. 618:2-619:5. Chancellor Blank testified that she has not heard of any school paying students
 for GPAs or graduation bonuses and worries that this would incentivize students not to take difficult
 courses. Tr. 895:15-896:15. Such payments would “send[] a very negative message to those
 students who need a little more support and mentoring to catch up that first year.” *Id.*

25 ¹⁶¹ Tr. 619:4-5.

26 ¹⁶² Roland G. Fryer, Jr., “Financial Incentives and Student Achievement: Evidence from
 Randomized Trials.” *The Quarterly Journal of Economics* 126.4 (2011): 1755-1798.

27 ¹⁶³ Tr. 2067:15-17 (Noll).

28 ¹⁶⁴ Tr. 618:10-13.

¹⁶⁵ Tr. 494:11-495:10. Dr. Noll admits that “there are a lot of papers that find there is no effective
 (cont.)

1 And the NCAA cannot offset this negative change in incentives by simply limiting the
 2 number of hours student-athletes are permitted to spend on athletics. The NCAA's limitations on
 3 student-athlete time demands are only a small part of the interconnected set of rules, including the
 4 amateurism rules and academic eligibility requirements, which combined make up the collegiate
 5 model. As Dr. Heckman testified, those limitations alone would not "guarantee [student-athletes]
 6 are going to spend that time studying."¹⁶⁶ This is especially true if there were "a substantial change
 7 in the Collegiate Model," which would "rebalance the incentives" of student-athletes and other
 8 stakeholders, motivating student-athletes, in particular, "to substitute effort toward athletics in place
 9 of academics."¹⁶⁷ As Commissioner Scott testified, even under the current amateur model of college
 10 sports, "student athletes want to participate" in their sport beyond the practices and workouts
 11 mandated by their coaches and do so through a variety of voluntary activities.¹⁶⁸ If student-athletes
 12 already choose to dedicate time beyond NCAA limits improving their athletic performance, new
 13 limits would be even less effective if student-athletes were paid based on their athletic performances.

14 b. The Challenged Rules Prevent the Creation of a Wedge

15 As in *O'Bannon*, Defendants also proved that "by prohibiting student-athletes from being
 16 paid large sums of money not available to ordinary students, the rules prevent the creation of a social
 17 'wedge' between student-athletes and the rest of the student body."¹⁶⁹ Dr. Heckman, for example,
 18 testified that payment only to student-athletes "creates a special class of people and creates a special
 19 incentive. It separates them, creates a wedge"¹⁷⁰ Further, "payments would change the nature

20 incentives." Further, the fact that Dr. Noll is unaware of "any economic evidence that the use by
 21 various conferences or schools of scholarships based on GPA level, for example, have had any
 22 negative effect on academic performance by athletes," Tr. 2069:8-19, does not mean that *payment*
 23 for obtaining a certain GPA or progressing toward a degree would not have a negative effect. As Dr.
 24 Elzinga explained with respect to the Duncan Clark Hyde Award at the University of Virginia, such
 25 an award "is simply an award that is given to one student. It is not a department wide or university
 26 wide reward system in which students are given funds that would be a positive function of their
 27 GPA." Tr. 506:18-508:16.

24 ¹⁶⁶ Tr. 617:13-618:1.

25 ¹⁶⁷ Heckman Dir. Test. ¶¶ 63-64.

26 ¹⁶⁸ Tr. 1227:3-11. When asked about student-athletes who reported spending fifty hours a week on
 27 their sport, Commissioner Scott testified, "I can assure you if anyone is spending 50 hours on their
 28 sport, a significant portion of those hours are voluntary, they are choosing to do it." Tr. 1227:11-13.

¹⁶⁹ 802 F.3d at 1060 (quoting *O'Bannon*, 7 F. Supp. 3d at 980, 1003).

¹⁷⁰ Tr. 632:23-633:3; *see also* Tr. 657:11-658:3.

1 of the relationship . . . of those students to the university compared to other students.”¹⁷¹ So even a
 2 “pure graduation incentive” would “more or less isolat[e] those students from the rest of the student
 3 body.”¹⁷²

4 Plaintiffs recognize that there is already a divide between student-athletes and their non-
 5 athlete peers.¹⁷³ Some students already have the impression that student-athletes enjoy a preferential
 6 status because of the financial aid and benefits they receive, which can foster resentment.¹⁷⁴ But the
 7 rules on amateurism moderate the divide relative to what it would be in a world of unconstrained
 8 pay-for-play. As President Hatch explained, paying student-athletes would create a “divorce”
 9 between walk-ons and scholarship teammates, would create problems with non-athlete students, and
 10 would cause faculty to protest and be highly skeptical of student-athletes being paid above the cost
 11 of attendance.¹⁷⁵ Ohio State AD Gene Smith likewise testified that paying only student-athletes on
 12 certain teams or paying student-athletes different amounts on the same team would create a wedge
 13 between these student-athletes.¹⁷⁶ And, given Plaintiffs’ concession that a “safe harbor” injunction
 14 ordering a specific dollar amount for all student-athletes would be inappropriate,¹⁷⁷ student-athletes
 15 would almost surely receive different amounts. Plaintiff Afure Jemerigbe testified that she

17 ¹⁷¹ Tr. 632:3-13 (Heckman).

18 ¹⁷² Tr. 632:13-15 (Heckman).

19 ¹⁷³ *See, e.g.*, Pls.’ Closing at 21; Tr. 828:24-829:6 (Hartman) (recognizing that there is a divide
 20 between student-athletes and non-athlete students because non-athletes “think that student-athletes
 21 have it easier”).

22 ¹⁷⁴ *See, e.g.*, Stephens Tr. 138:23-140:12; Tr. 828:19-829:6 (Hartman). In a mock commencement
 23 speech submitted to theplayertribune.com, Plaintiff Nigel Hayes explained that student-athletes
 24 “are sometimes misunderstood” and don’t “just get free A’s without going to class and taking any
 25 tests.” D0719-0004 (emphasis in original). Plaintiff Alec James likewise testified that other
 26 students’ beliefs about what student-athletes receive—such as the mistaken belief that he received a
 27 moped from his school—affect perceptions of student-athletes. James Tr. 294:22-295:17.

28 ¹⁷⁵ Tr. 2000:13-2001:22; *see also id.* (explaining that he believes student-athletes are already
 generally considered privileged on campus, and that paying them more would be “divisive within the
 university”); *see also* Alger Tr. 127:15-128:6 (“I think it would create a lot of resentment among
 other students who presumably would not have access to the same sort of resource, many of whom
 have significant financial need.”); Tr. 1454:2-15 (Smith) (testifying he expects that the relationship
 between student-athletes and faculty members would change if student-athletes were paid, with
 “many . . . faculty members . . . no longer com[ing] to our contests or be[ing] supportive of the
 model.”).

¹⁷⁶ Tr. 1409:20-1410:6.

¹⁷⁷ Pls.’ Closing at 43.

1 “wouldn’t be too happy” if football players were to receive more in financial aid than women’s
 2 basketball players and that it would bother her if another member of her basketball team received
 3 more in aid than she did.¹⁷⁸ Shawne Alston also confirmed that he does not know how schools
 4 would “differentiate who gets what”; as he previously told the *New York Times*, “[f]rom player to
 5 player and school to school, it’s touchy.”¹⁷⁹

6 3. *Integration Is a Valid Procompetitive Justification*

7 In their closing brief, Plaintiffs’ entire argument that integration is not a legally cognizable
 8 procompetitive justification consists of a two-word parenthetical—“(it’s not).”¹⁸⁰ This argument, in
 9 addition to being unconvincing, is contrary to controlling law. Multiple courts, including this Court
 10 and the Ninth Circuit in *O’Bannon*, have recognized that integration “improve[s] the schools’
 11 college education product”¹⁸¹ and thus is a legitimate procompetitive justification.

12 At trial, Defendants demonstrated that academic integration is an economically
 13 procompetitive benefit because it increases the quality of the college education product.

14 Student-athletes benefit from the education that provides the primary value of their
 15 scholarships. Dr. Heckman’s direct testimony confirms that there are “substantial benefits to
 16 participation . . . in NCAA Division I basketball and FBS football,” and “[t]he current Collegiate
 17 Model contributes to the balance of incentives for students to spend time both on athletics and
 18 academics.”¹⁸² Plaintiffs ignore the fact that the collegiate model itself “results in beneficial
 19 educational and economic outcomes for student-athletes.”¹⁸³ As Dr. Heckman explained, “[s]tudent-

20 ¹⁷⁸ Jemerigbe Tr. 294:3-11, 295:5-9.

21 ¹⁷⁹ Tr. 722:4-723:1.

22 ¹⁸⁰ Pls.’ Closing at 24.

23 ¹⁸¹ *O’Bannon*, 7 F. Supp. 3d at 908; *see also O’Bannon*, 802 F.3d at 1059-60; *McCormack*, 845 F.2d
 24 at 1344-45. As the Fifth Circuit explained in *McCormack*, “[t]he NCAA markets college football as
 25 a product distinct from professional football. . . . The goal of the NCAA is to integrate athletics with
 26 academics. Its requirements reasonably further that goal.” 845 F.2d at 1344-45 (footnote omitted);
 27 *see also Deutscher Tennis Bund v. ATP Tour, Inc.*, 610 F.3d 820, 833 (3d Cir. 2010) (athletics “rules
 28 and regulations can be procompetitive where they enhance the ‘character and quality of the
 “product”” (quoting *Bd. of Regents*, 468 U.S. at 112)).

¹⁸² Heckman Dir. Test. ¶ 11. Underpinning Dr. Heckman’s analysis was his empirical evaluation,
 which analyzed the effects of participation in athletics at different life stages and assessed the effects
 of athletics participation both incrementally and sequentially. *Id.* ¶ 4.

¹⁸³ Heckman Dir. Test. ¶ 66.

1 athletes receive substantial short-term and long-term human capital benefits, which substantially
 2 exceed the direct financial support of athletic scholarships”¹⁸⁴ These “include, among other
 3 things, the benefits of training, mentoring, classroom education, exposure to diverse communities,
 4 publicity, developing self-discipline, leadership and teamwork skills, time management skills,
 5 networks, and an identity with the school.”¹⁸⁵

6 In earning their degrees while playing intercollegiate athletics, student-athletes are provided
 7 the means to get an education they can later fall back on and that otherwise may not have been
 8 available or as financially feasible.¹⁸⁶ Indeed, Plaintiff Justine Hartman testified that she does not
 9 know that she would have gone to college without an athletic scholarship and accepts that she had
 10 the privilege to attend Berkeley because she showed herself to be superior at basketball.¹⁸⁷ And
 11 Ohio State AD Gene Smith received an athletic scholarship to play football at Notre Dame where he
 12 obtained a degree in business administration.¹⁸⁸ He was the first member of his family to attend
 13 college, and prior to receiving scholarship offers, he had no intention of going to college.¹⁸⁹

14
 15
 16 ¹⁸⁴ Heckman Dir. Test. ¶ 11; *see also id.* ¶¶ 31-32.

17 ¹⁸⁵ Heckman Dir. Test. ¶ 11. Plaintiffs instead focus on Dr. Heckman’s statement that an individual
 18 student would be “better off” if he or she received additional compensation. Pls.’ Closing at 22. But
 19 this ignores the fact that there “could be large systematic adjustments if everybody gets [additional
 payments]” and that even a “small change and the costs to the university system, and so forth, would
 probably have small reverberations through the system.” Tr. 595:24-596:3, 597:2-6 (Heckman).

20 ¹⁸⁶ Tr. 686:18-688:7 (Alston); *see also* Heckman Dir. Test. ¶ 69 (“[T]he economics literature
 21 strongly supports the notion that many students, including student-athletes, would not have attended
 college in the first place without some means of assistance. These student-athletes would not receive
 22 any of the lifetime benefits from a college education without the benefit of the athletic
 scholarship.”); Jemerigbe Tr. 243:13-244:2 (explaining that she does not think that she would have
 gotten into Berkeley without athletics and that getting into Berkeley was a unique opportunity that
 she might not otherwise have had).

23 ¹⁸⁷ Tr. 821:12-23. Ms. Hartman’s scholarship was even extended after her athletic eligibility
 expired. Tr. 829:24-830:7.

24 ¹⁸⁸ Tr. 1377:20-21, 1379:25-1380:1.

25 ¹⁸⁹ Tr. 1377:21-1378:4, 1378:24-1379:15. Mr. Smith testified that he initially struggled with
 26 academics at Notre Dame but ultimately became a successful student. Tr. 1380:10-21. He
 27 acknowledged that both athletics and academics were significant time commitments at Notre Dame,
 but he believes that the opportunity to attend Notre Dame and play football was beneficial in that he
 28 was exposed to a diverse group of students and learned valuable skills such as time management and
 overcoming adversity. Tr. 1381:7-1382:3. Mr. Smith does not believe that he would have been as
 successful as he is today if he had not been a student-athlete. Tr. 1382:4-7.

1 In addition, the integration of academics and athletics is procompetitive because like
 2 amateurism, it promotes consumer demand for college athletics. Chancellor Blank, President Hatch,
 3 and Ohio State AD Gene Smith explained in detail how student-athletes being *bona fide* students,
 4 integrated within the university community, contributes to the popularity of college sports with non-
 5 athlete students, alumni, faculty, and university staff.¹⁹⁰ Blank testified that “the largest applause
 6 line” she gets when speaking with donors and the Wisconsin community about student-athletes is
 7 when she talks “about the off-field academic performance of our students, our alumni are very proud
 8 of that.”¹⁹¹ When asked about whether members of the university community discuss “what they
 9 like about college athletics and why they watch or attend college athletics,” Blank explained that she
 10 “frequently” hears students talk about knowing student-athletes from class “and hav[ing] that
 11 connection with them as a fellow student.”¹⁹² Similarly, with alumni and community members,
 12 “there’s a strong connection to the athletes as students at the university.”¹⁹³ Smith explained that for
 13 the “significant number” of faculty holding season tickets, “student athletes are -- are students in
 14 their classes,” and that “the faculty member looks at the student athlete from the view of being a
 15 student at The Ohio State University. They don’t just look at them as a football player.”¹⁹⁴

16 **D. The Challenged Rules Promote the Principle of Amateurism**

17 For the reasons described above, the NCAA’s basic tenet of not paying student-athletes adds
 18 to consumer demand for college sports and facilitates the academic success and integration of
 19 student-athletes into the campus community. This tenet is embodied in the NCAA’s Constitution,
 20 which sets out “The Principle of Amateurism”¹⁹⁵ and a “basic purpose” of “retain[ing] a clear line of

21 ¹⁹⁰ See *supra*, 14-17.

22 ¹⁹¹ Tr.862:24-863:9; see also Tr. 863:16-24 (Blank) (testifying that the community around
 23 Wisconsin is “just as likely to ask about are we treating our athletes right in terms of their academic
 performance” as athletic performance).

24 ¹⁹² Tr. 949:20-950:6.

25 ¹⁹³ Tr. 950:7-12 (Blank).

26 ¹⁹⁴ Tr. 1411:16-1412:4; see also, e.g., Tr. 868:23-869:21 (Blank).

27 ¹⁹⁵ J0024-0016 (NCAA Const. art. 2.9) (“Student-athletes shall be amateurs in an intercollegiate
 28 sport, and their participation should be motivated primarily by education and by the physical, mental
 and social benefits to be derived. Student participation in intercollegiate athletics is an avocation,
 and student-athletes should be protected from exploitation by professional and commercial
 enterprises.”). Several witnesses paraphrased this general principle, but all were consistent with its
 core tenet. See, e.g., Tr. 1122:5-15 (Scott); Tr. 1342:20-25 (Lennon); Elzinga Dir. Test. ¶ 71.

1 demarcation between intercollegiate athletics and professional sports.”¹⁹⁶ In furtherance of these
 2 constitutional values, the NCAA also enacts detailed bylaws, which “govern[] the conduct of the
 3 intercollegiate athletics programs of its member institutions” in a manner that advances this and
 4 other fundamental principles of the NCAA.¹⁹⁷ Plaintiffs challenge a subset of these bylaws,
 5 specifically those “that fix and cap the compensation and benefits that schools may offer to Class
 6 Members for their athletic services.”¹⁹⁸ These are thus the core rules promoting the principle of
 7 amateurism, and as such they “define the product the NCAA has on offer – amateur intercollegiate
 8 athletics,”¹⁹⁹ and facilitate academic integration.²⁰⁰

9 While “the principle of amateurism overlays all of the bylaws,”²⁰¹ the NCAA must often
 10 “delicate[ly] balance” that principle (codified in NCAA Const. art. 2.9), against other fundamental
 11 principles, such as “The Principle of Institutional Control and Responsibility” (NCAA Const. art.
 12 2.1), “The Principle of Student-Athlete Well-Being” (NCAA Const. art. 2.2), “The Principle of
 13 Sound Academic Standards” (NCAA Const. art. 2.5), and “The Principle Governing Financial Aid”
 14 (NCAA Const. art. 2.13).²⁰² Balancing these fundamental principles is a critical part of how “[t]he
 15 NCAA plays a critical role in the maintenance of a revered tradition of amateurism in college
 16 sports.”²⁰³ The Supreme Court has observed that “[t]here can be no question but that [the NCAA]
 17 needs ample latitude to play that role,”²⁰⁴ and the Ninth Circuit in *O’Bannon* held that this

18
 19 ¹⁹⁶ J0024-0013 (NCAA Const. art. 1.3.1).

20 ¹⁹⁷ J0024-0041 (NCAA Const. art. 5.01.1); *see also* Tr. 1283:24-1284:4 (Lennon) (the NCAA’s
 21 bylaws “must comport with what’s in the [NCAA] Constitution, our overarching principles”); Tr.
 22 1462:23-1463:14 (G. Smith) (the NCAA enacts rules that “tie . . . to certain principles to . . . make
 23 sure that we stay true to what we’re all about,” such as “the amateur model,” “academics,” and
 “helping young people develop competitively and socially”). The Principle of Amateurism in one in
 a series of “Principles for Conduct of Intercollegiate Athletics” established by the NCAA
 Constitution. J0024-0015-17 (NCAA Const. art. 2) (Principles of Conduct of Intercollegiate
 Athletics).

24 ¹⁹⁸ Pls.’ Op. at 12.

25 ¹⁹⁹ Elzinga Dir. Test. at 16 n.35; *see supra* Part II.B.1.

26 ²⁰⁰ *See supra* Part II.C.

27 ²⁰¹ Tr. 1575:20-21 (Lennon).

28 ²⁰² J0024-0015 (NCAA Const. art. 2.01).

²⁰³ *Bd. of Regents*, 468 U.S. at 120.

²⁰⁴ *Id.*

1 “admonish[ment]” from the Supreme Court requires courts to “generally afford the NCAA ‘ample
2 latitude’ to superintend college athletics.”²⁰⁵

3 The judiciary may not, therefore, micromanage college sports from afar, tinkering with a rule
4 here or a rule there. “In an intertwined and complex system such as collegiate athletics, one cannot
5 assume that a change to one factor will not affect any other factor.”²⁰⁶ As Dr. Heckman testified, the
6 current collegiate model exists in an equilibrium, and substantial changes to a key component in that
7 model (such as the prohibition on payments to student-athletes) could have dramatic systemic
8 effects, harming both the academic and economic success of student-athletes and the product of
9 college sports itself.²⁰⁷

10 Most relevant in this case, many NCAA bylaws are designed to balance student-athletes’
11 well-being against the possibility that providing excessive benefits could function as a form of
12 payment for playing sports.²⁰⁸ Focusing on only half of this balancing process, Plaintiffs make much
13 ado about NCAA Vice President for Division I Governance Kevin Lennon’s testimony that the
14 provision of certain benefits incidental to participation is not related to preserving amateurism.²⁰⁹ To
15 be sure, Lennon agreed that “the reason incidental benefits are provided to student athletes is not
16 based on the -- the reason behind amateurism,” but rather “to support our student athletes’ well-
17 being.”²¹⁰ But, as Lennon consistently testified, the provision of such benefits must be done in a
18 way “consistent with the principle of amateurism,” which may require capping the benefit to prevent
19 it from becoming “a form of pay.”²¹¹ So, to use commemorative awards as an example, the NCAA
20 allows student-athletes to receive limited awards “for the purpose of commemorating participation,”

21 ²⁰⁵ 802 F.3d at 1074 (citing *Law v. NCAA*, 134 F.3d 1010, 1022 (10th Cir. 1998) (“[C]ourts should
22 afford the NCAA plenty of room under the antitrust laws to preserve the amateur character of
intercollegiate athletics.”)).

23 ²⁰⁶ Heckman Dir. Test. ¶ 73.

24 ²⁰⁷ Heckman Dir. Test. ¶¶ 74-78.

25 ²⁰⁸ Tr. 1358:18-1359:2 (Lennon) (“[T]he Division I Council of the NCAA . . . decides whether the
benefits that are provided are advancing the student’s well-being without it ever morphing into pay.
And that’s why there’s caps and that’s why these are all deemed to be very reasonable expenses and
26 to provide a student athlete to support their well-being, that’s the Council’s motivation.”).

27 ²⁰⁹ See Pls.’ Closing at 1-2, 16.

28 ²¹⁰ Tr. 1303:20-1304:3.

²¹¹ Tr. 1275:12-22, 1276:25-1277:8, 1303:20-1304:3, 1308:7-1309:12, 1322:14-20, 1624:25-1627:1.

1 but it imposes caps on those awards to “preserv[e] the value of amateurism.”²¹² Without these caps,
 2 “there certainly could come a point where the -- the award that is provided would morph into pay-
 3 for-play and so there are limitations that are necessary.”²¹³ As much as Plaintiffs may try to
 4 obfuscate this simple principle by selectively quoting Lennon, the unrefuted evidence is that the
 5 purpose of the NCAA’s limits on compensation or benefits to student-athletes is to promote
 6 amateurism.²¹⁴

7 Plaintiffs misleadingly argue that the NCAA’s “ever-changing definition of amateurism is
 8 arbitrary”²¹⁵ The most that Plaintiffs can actually show is that specific, individual bylaws
 9 enacted in furtherance of the NCAA’s amateurism principle have been revised over time. It is
 10 undoubtedly true that there have been adjustments made over time to the educational expenses and
 11 the types of benefits incidental to participation permitted under the NCAA’s rules. But these
 12 technical bylaws implement the principle of amateurism; they are not the principle itself. “The
 13 fundamental principle is that this is not about student athletes playing a game to get paid, it is not
 14 about pay-for-play, it’s about . . . young men and women playing these games while they are
 15 students at their universities.”²¹⁶

16 This is why Plaintiffs miss the mark when they rhetorically ask whether amateurism would
 17 be adversely affected if some marginal extra benefit were permitted.²¹⁷ As Dr. Elzinga testified,
 18 “The central tenet of amateurism is not a specific dollar amount (as in \$X = amateur, but \$X + ε =
 19 professional). Rather, the defining feature is that student-athletes not be paid to play their respective
 20 sports.”²¹⁸ This is the same approach the Ninth Circuit took in defining amateurism in *O’Bannon*,

21 _____
 22 ²¹² Tr. 1624:25-1627:1 (Lennon).

23 ²¹³ Tr. 1626:22-1627:1 (Lennon).

24 ²¹⁴ This conclusion is almost tautological. Amateurism is, by definition, “not paying” the
 25 participants. *O’Bannon*, 802 F.3d at 1076. Thus, the rules setting limits on the benefits student-
 26 athletes may receive are part of the “amateurism rules.”

27 ²¹⁵ Pls.’ Closing at 14 (capitalization omitted).

28 ²¹⁶ Tr. 1621:24-1622:9 (Lennon); *cf.* *O’Bannon*, 802 F.3d at 1076 (“[T]he district court probably
 underestimated the NCAA’s commitment to amateurism.”).

²¹⁷ *See, e.g.*, Tr. 408:7-409:2 (asking about “a penny” or “a dollar” more), Tr. 422:23-424:1 (asking
 about paying for parking tickets); Lewis 30(b)(6) Tr. 158:23-159:3 (asking about “one penny more
 than cost of attendance”).

²¹⁸ Elzinga Dir. Test. ¶¶ 34-35; *see also id.* ¶ 14 (“[T]he difference between amateurism and
 (cont.)

1 holding that “not paying student-athletes is *precisely what makes them amateurs*.”²¹⁹ And it is this
 2 principle that the challenged restraints promote by “fix[ing] and cap[ping] the compensation and
 3 benefits that schools may offer to Class Members for their athletic services.”²²⁰ Because the
 4 NCAA’s principle of amateurism is procompetitive in promoting consumer demand and fostering
 5 academic integration, the challenged restraints that effectuate that principle are also procompetitive.

6 **III. NONE OF PLAINTIFFS’ PURPORTED LESS RESTRICTIVE ALTERNATIVES** 7 **SATISFY THE UNAMBIGUOUS LEGAL REQUIREMENTS**

8 In closing, Plaintiffs write, “all that Plaintiffs’ less-restrictive alternatives require is
 9 *eliminating all NCAA compensation rules*”²²¹—finally exposing without a hint of doubt that the
 10 remedy Plaintiffs seek is the elimination of amateurism in collegiate sports. As this Court has already
 11 recognized, if Defendants have met their burden at step two by demonstrating that the challenged rules
 12 contribute to the procompetitive justifications of amateurism and integration, the NCAA must be
 13 permitted to impose compensation limits on its member schools.²²² Plaintiffs cannot meet their burden
 14 at step three of the rule of reason analysis because each of their three proposed alternatives would
 15 permit unlimited pay-for-play. And, although it is not Defendants’ burden to disprove Plaintiffs’
 16 proposed less restrictive alternatives, the evidence plainly shows that those alternatives would destroy
 17 the identified procompetitive benefits and would come with increased costs.²²³

18 (1) *The Requested Injunction*. Plaintiffs’ first proposal would prohibit the NCAA from
 19 adopting or enforcing *any* rules that limit compensation available to student-athletes and allow pay-for-

20 professionalism isn’t captured in some wooden and mechanical way by the number of dollars a
 21 student-athlete receives. True student-athletes are amateurs in the sense that they are not being paid
 22 to play.” (emphasis omitted)).

23 ²¹⁹ *O’Bannon*, 802 F.3d at 1076 (emphasis in original)).

24 ²²⁰ Pls.’ Op. at 12.

25 ²²¹ Pls.’ Closing at 34 (emphasis added).

26 ²²² MSJ Order at 34:6-13 (“To be clear, if Defendants prevail in demonstrating the same
 27 procompetitive justifications that the Court found in *O’Bannon*, the NCAA will still be able to
 28 prohibit its member schools from paying their student-athletes cash sums unrelated to educational
 expenses or athletic participation. *O’Bannon*, 802 F.3d at 1078-79. Under such circumstances, the
 Court will not consider any proposed less restrictive alternative by which Plaintiffs seek payment
 untethered to one of these two categories.”).

²²³ *See, e.g., O’Bannon*, 802 F.3d at 1074 (“[T]o be viable under the Rule of Reason,” “an alternative
 must be virtually as effective in serving the procompetitive purposes of the NCAA’s current rules,
 and without significant increased cost.” (quotation marks omitted)).

1 play in every conceivable form.²²⁴ As should be obvious, an alternative that calls for the complete
 2 elimination of amateurism rules cannot be “virtually as effective” as those rules at protecting
 3 amateurism and its role in promoting both consumer demand and academic integration.²²⁵ The
 4 challenged rules help promote consumer demand, integrate academics and athletics for student-
 5 athletes, increase integration of student-athletes into the broader school community, and prevent
 6 greater tension between student-athletes and non-athlete students and faculty over perceived student-
 7 athlete privileges.²²⁶ Yet the Requested Injunction contemplates no limitation that might possibly
 8 serve these interests and protect from the inevitable: a world in which student-athletes are
 9 financially motivated to increase their emphasis on athletics over academics and some campus
 10 communities are divided by the university’s decision to pay certain student-athletes, and only those
 11 student-athletes.

12 Perhaps recognizing this, Plaintiffs speculate that, in the absence of a single national set of
 13 compensation rules, the conferences may create new compensation rules on a conference-by-
 14 conference basis. But Plaintiffs neither seek nor propose any new infrastructure whereby the
 15 conferences would fill that void. Indeed, Plaintiffs claim (at 34) that the Requested Injunction is
 16 cost-free because it would *not* require the conferences to develop their own amateurism rules; rather,
 17 it would be their choice to do so, or not. While Plaintiffs have dubbed this “conference autonomy,”
 18 they admit that this is “a traditional antitrust injunction” that would simply preclude Defendants
 19 from agreeing to abide by the restraints without implementing any substitute in its place.²²⁷ And to
 20 the extent Plaintiffs depend on the adoption by conferences of their own rules in an attempt to meet
 21 their burden to establish the existence of a less restrictive alternative, they are stuck with the
 22

23 ²²⁴ See Pls.’ Op. at 41-42, 44-45 & App’x C; see also Pls.’ Closing at 34.

24 ²²⁵ See *O’Bannon*, 802 F.3d at 1076 (“Having found that amateurism is integral to the NCAA’s
 25 market, the district court cannot plausibly conclude that being a poorly-paid professional collegiate
 26 athlete is ‘virtually as effective’ for that market as being as amateur.”).

27 ²²⁶ This is the second time the NCAA has made this demonstration at trial. See *O’Bannon*, 802 F.3d
 28 at 1059-60 (the procompetitive justification of integration was met by evidence that compensation
 restrictions help “prevent the creation of a social ‘wedge’ between student-athletes and the rest of the
 student body”).

²²⁷ Pls.’ Op. at 7.

1 significant additional costs that conference-level rulemaking would impose—thus rendering the
2 proffered less restrictive alternative legally ineffective.²²⁸

3 (2) *The Alternative Injunction*. Plaintiffs’ second option is nearly identical to the first and
4 would also permit unlimited cash compensation. Like the first, it calls for a full prohibition on
5 NCAA compensation rules, except the NCAA could prohibit payment of purely “cash sums”
6 untethered to what Plaintiffs call “education related expenses or benefits.”²²⁹ While that language
7 seems like a nod to *O’Bannon*, it plainly goes farther and would allow “cash sums untethered to
8 *educational expenses*,” in direct contravention of *O’Bannon*.²³⁰ Plaintiffs’ vague expansion of the
9 reference to “educational expenses” would erode what it means to be an amateur and pervert the
10 holding of *O’Bannon* which related to the cost of attending college by allowing pay for anything
11 ostensibly “related” to education, including, for example, attending class, doing homework,
12 completing a course, maintaining a minimum grade point average, or graduating. No matter how
13 such payments are characterized, by going only to student-athletes they are functionally no different
14 than pay-for-play, as NCAA student-athletes must already meet academic eligibility requirements.

15 (3) *The Modified Alternative Injunction*. For the first time in their closing, Plaintiffs raise (at
16 43) “one additional possibility,” which would modify the Alternative Injunction to permit the NCAA
17 to cap benefits incidental to participation in athletics. Other than that carve-out, which could be
18 circumvented by characterizing a benefit as education-related rather than incidental to participation,
19 the Modified Alternative Injunction is defective for the same reasons as the Alternative Injunction.
20 Indeed, Plaintiffs do not actually endorse this Modified Alternative Injunction, arguing (at 43)
21 instead without any factual support that the NCAA should be precluded from capping benefits
22 incidental to participation because they are “based on anticompetitive cost-control considerations,
23 not any consideration of Defendants’ ostensible procompetitive justifications.”

24
25 ²²⁸ See Part III.C.4, *infra*.

26 ²²⁹ Pls.’ Op. at 7-8, 43-44, 46 & App’x D; Pls.’ Closing at 33, 42.

27 ²³⁰ *O’Bannon*, 802 F.3d at 1078 (differentiating between “educational-related compensation” (*i.e.*,
28 financial aid) and what was contemplated by the district court’s order allowing \$5,000 trust fund
payments—“cash sums untethered to educational expenses”).

1 Notably, Plaintiffs have not proposed an alternative injunction specifically ordering any of
 2 the various additional benefits that they discussed at trial, and rightfully so. This Court is not
 3 authorized under the antitrust laws simply to tinker with the compensation rules already in place and
 4 instead must comport with the Supreme Court's caution that the NCAA "needs ample latitude" to
 5 maintain and preserve the unique traditions of amateurism and higher education in intercollegiate
 6 sports.²³¹ "'Metering' small deviations is not an appropriate antitrust function any more than is the
 7 defense that a price fix is lawful if the fixed price is 'reasonable.'"²³²

8 **A. Plaintiffs' Experts Did Not Competently Establish What Would Happen If the**
 9 **Requested Relief Were Granted**

10 Not one of Plaintiffs' four experts (one of whom was withdrawn before trial) put forth an
 11 analysis that informs what would result from Plaintiffs' proposals. Drs. Rascher and Noll, freely
 12 admit that they have not attempted to predict what would happen if any of Plaintiffs' proposed
 13 injunctions were implemented.²³³ Indeed, Rascher informed the Court that the process of figuring
 14 out what conference rules might develop in place of the national rules in Plaintiffs' but-for world
 15 could take *eight or nine years*.²³⁴ Nor did Mr. Poret even purport to test the potential impact on
 16 consumer demand if the challenged rules were eliminated, or what would happen if conferences
 17 implemented varying compensation rules.²³⁵ Rather, Poret tested whether fans predicted they would

18 ²³¹ *Bd. of Regents*, 468 U.S. at 120; *see also O'Bannon*, 802 F.3d at 1074 ("[T]he Supreme Court has
 19 admonished that we must generally afford the NCAA 'ample latitude' to superintend college
 20 athletics."); *Law*, 134 F.3d at 1022 n.14 (remarking that "courts should afford the NCAA plenty of
 21 room under the antitrust laws to preserve the amateur character of intercollegiate athletics"); *Race*
Tires Am., Inc. v. Hoosier Racing Tire Corp., 614 F.3d 57, 83 (3d Cir. 2010) (noting that, generally,
 "sports-related organizations should have the right to determine for themselves the set of rules that
 they believe best advance their respective sport").

22 ²³² Areeda at ¶ 1505; *see also id.* ("If members of a joint venture are found to be unlawfully fixing
 prices at \$10, lowering the price to \$8 or some other number is not the type of less restrictive
 alternative contemplated by antitrust law.").

23 ²³³ Tr. 69:7-21 (Rascher); Tr. 254:14-18 (Noll). At most, Dr. Rascher testified that he did not expect
 24 conferences would implement rules permitting "unfettered competition," if allowed. Tr. 103:9-17
 25 (Rascher). However, he did not opine as to what benefits would be offered in the but-for world, and
 he freely admitted that he had not interviewed any university officials or conducted any empirical
 analysis as a basis for his opinions. Tr. 68:12-13, 69:7-21.

26 ²³⁴ Tr. 106:4-14.

27 ²³⁵ *See* Tr. 61:2-9 (Rascher) ("[Poret] does not test an unlimited payment"); Tr. 1693:1-20, (Poret)
 28 (agreeing that his survey did not test whether there exists an amount of student-athlete compensation
 that could be provided without affecting consumer demand or if so, where that line would be); *see*
also Isaacson Dir. Test. ¶ 20 ("Mr. Poret did not test what would happen if there were no limits on
 (cont.)

1 continue to watch intercollegiate sports in the future if student-athletes were to receive certain
 2 individual additional benefits.²³⁶ Indeed, Poret did not even study—and therefore was unable to
 3 offer opinions about—what would happen if more than one of his tested compensation scenarios
 4 were implemented simultaneously.²³⁷

5 Moreover, as discussed in Part II.B.2, *supra*, Mr. Poret’s survey indisputably did not test the
 6 extent to which respondents were fans of college sports because the athletes were amateurs and not
 7 professionals. And as Defendants’ expert Dr. Isaacson testified extensively, Mr. Poret’s
 8 methodology was flawed in significant ways. Importantly, Poret’s survey asked respondents to
 9 predict what action they would take in future hypothetical scenarios, which is “not a valid question
 10 in this context” and is “completely different than the approach that’s typically used to predict
 11 consumer behavior by marketers and by social scientists.”²³⁸ While Poret claimed at trial that he
 12 relied on “what [he] considered to be standard accepted procedures,” he was not able cite a single
 13 academic article to support his view that his methodology was appropriate and has not written any
 14 peer-reviewed articles about the survey methodology he employed.²³⁹ He also admitted that it is
 15 well accepted that the “artificial nature of a survey environment often causes very significant
 16 percentages of respondents to give answers that do not reflect real world conditions or behavior at
 17 all” and that “people are notoriously bad at predicting their future behavior in surveys.”²⁴⁰

18
 19 compensation whatsoever, if conferences were permitted to set their own limits, or if only cash
 20 payments untethered to educational expenses were barred.”).

21 ²³⁶ Poret Dir. Test. ¶ 24 (listing scenarios).

22 ²³⁷ Tr. 1657:18-1658:16. Moreover, Plaintiffs’ assertion (at 30) that Mr. Poret’s testing of eight
 23 specific scenarios somehow supports conclusions regarding other untested benefits “of the type he
 24 tested” were implemented should be rejected. Mr. Poret’s direct testimony is devoid of any support
 25 for such conjecture, and Plaintiffs presented no evidence at trial that would inform how one might
 26 credibly make such an extrapolation.

27 ²³⁸ Tr. 1948:10-1949:1, 1957:7-20 (Isaacson); *see also* Isaacson Dir. Test. ¶¶ 15 *et seq.*; Tr. 1954:12-
 28 18 (Isaacson). As Dr. Isaacson explained, the proper methodology is to ask respondents for their
 preferences and use those responses as an indicator for future behavior. Tr. 1948:16-1949:7.

²³⁹ Tr. 1670:23-1671:6, 1671:20-23. Mr. Poret does not have a relevant doctoral degree; he has a
 law degree. Tr. 1655:13-20. He started his career as an attorney, before transitioning into work as
 an expert witness working on legal cases. Tr. 1671:7-19 (Poret). In contrast, Dr. Isaacson has two
 relevant degrees (from Harvard): a master’s of business administration and doctor of business
 administration in marketing and marketing research. Tr. 1954:25-1956:3 (Isaacson) (qualifications).

²⁴⁰ Tr. 1725:16-23 (Poret).

Each of Mr. Poret's scenarios also required respondents to make the assumption that "the benefits described would be paid for from the revenue generated by the athlete's team."²⁴¹ But for nearly half of FBS football teams,²⁴² 80% of Division I men's basketball teams,²⁴³ and each and every Division I women's basketball team,²⁴⁴ this assumption is baseless. Those teams do not generate sufficient revenue to pay existing expenses, so there is no surplus of team revenue available to pay for these new benefits. Thus, for each scenario he tested, "Mr. Poret has evaluated only a fictional scenario that is irrelevant to the actual marketplace that would exist if the additional forms of compensation and benefits were provided to student-athletes."²⁴⁵

Plaintiffs have offered no evidence whatsoever that the particular scenarios Mr. Poret included in his survey in any way correlate with what would occur in the but-for world if the Court issued any of Plaintiffs' proposed injunctions. Poret testified that he did no analysis to determine what scenarios to test—he simply tested the scenarios Plaintiffs' counsel gave him without assessing whether they had any connection to the injunctive relief proposed.²⁴⁶ In fact, Poret expresses no opinion as to whether the benefits contemplated by the scenarios bear any resemblance to any likely but-for world if the Court issued any of Plaintiffs' proposed injunctions.²⁴⁷

B. There Are No Analogous Situations to Plaintiffs' Requested Relief

²⁴¹ Poret Dir. Test. ¶ 38.

²⁴² In the most recently reported data, 46% of FBS football teams failed to generate sufficient revenue to cover their expenses. *See* J0017-0022 (NCAA Revenue & Expenses Report, Sept. 2017).

²⁴³ According to the most recent data, only 47% of men's basketball teams at Football Bowl Subdivision universities, 2% of men's basketball teams at Football Championship Subdivision universities, and 5% of men's basketball teams at universities without football programs reported revenue exceeding their expenses. *See* J0017-0022 (NCAA Revenue & Expenses Report, Sept. 2017) (FBS chart), 0076 (FCS chart), 0094 (no-football chart). In total, 278 of the 347 men's basketball teams in Division I *do not* generate sufficient revenue to cover their own expenses. *Id.*

²⁴⁴ Not a single one of the 345 women's basketball teams in Division I generates sufficient revenue to cover its own expenses, according to the most recent data. *See* J0017-0022 (NCAA Revenue & Expenses Report, Sept. 2017) (FBS chart), 0076 (FCS chart), 0094 (no-football chart).

²⁴⁵ Isaacson Dir. Test. ¶¶ 19, 76-78.

²⁴⁶ Tr. 1656:12-22.

²⁴⁷ *See* Isaacson Dir. Test. ¶ 20. Mr. Poret also admitted that, with respect to the academic and graduation incentive payments, he made no effort to see whether universities already allow such payments to their students at large. Tr. 1752:2-21 (Poret).

1 “[A]ny less restrictive alternatives ‘should either be based on actual experience in analogous
 2 situations elsewhere or else be fairly obvious.’”²⁴⁸ Plaintiffs have no real world analogue to
 3 establish what would result in the but-for-world, in the event their requested injunction were
 4 granted.²⁴⁹ The trial record is devoid of evidence concerning the “college athletic system during the
 5 first half of the 20th Century, when each conference had its own compensation rules.”²⁵⁰ Plaintiffs
 6 have presented no admissible evidence regarding the conference rules in place at the time, much less
 7 how, if at all, they would meet the procompetitive justifications of amateurism and integration as
 8 they exist in modern times. And *O’Bannon* already resolved that “professional baseball and the
 9 Olympics are not fit analogues to college sports.”²⁵¹

10 Plaintiffs’ reliance on what they call the “natural experiment” of Defendants’ permitting
 11 athletically-related financial aid up to the full cost of attendance also proves nothing. Plaintiffs’
 12 argument rests on an analysis set to be published in a forthcoming law review article titled,
 13 *Debunking the NCAA’s Myth that Amateurism Conforms with Antitrust Law: A Legal and Statistical*
 14 *Analysis*, by Thomas Baker, Marc Edelman, and Nicholas Watanabe.²⁵² However, as Defendants
 15 demonstrated, that study is not reliable evidence to support imposition of the proposed less
 16 restrictive alternatives in this case because (1) at most, it tests the impact on consumer demand of the
 17 redefinition of “grant-in-aid” to cost of attendance, and does not study what would happen if the
 18 NCAA limits on compensation were eliminated;²⁵³ (2) Plaintiffs’ own expert Dr. Noll admitted the
 19 findings concerning the relationship between the move to COA and consumer demand were *not*
 20
 21

22 ²⁴⁸ MSJ Order at 26:17-20; *see also M & H Tire Co., Inc. v. Hoosier Racing Tire Corp.*, 733 F.2d
 23 973, 987 (1st Cir. 1984) (rejecting alternatives that “are more hypothetical than practical”).

24 ²⁴⁹ Indeed, basic economics tells us to expect “market imperfections such as the so-called ‘free rider’
 25 effect” that can arise in the absence of restrictions. *See, e.g., Continental T.V., Inc. v. GTE Sylvania, Inc.*, 433 U.S. 36, 55 (1977); *see also Leegin Creative Leather Prods, Inc. v. PSKS, Inc.*, 551 U.S. 877, 890-91 (2007).

26 ²⁵⁰ MSJ Order at 28:3-5.

27 ²⁵¹ 802 F.3d at 1077; *see also id.* (“The Olympics have not been nearly as transformed by the
 28 introduction of professionalism as college sports would be.”).

²⁵² Tr. 359: 24-360:12 (Noll); *see also* Noll Dir. Test. at 47 n.109.

²⁵³ Tr. 2094:20-2095:17 (Noll).

1 causal;²⁵⁴ (3) the study is not a peer-reviewed analysis;²⁵⁵ and (4) it is not methodologically
2 sound.²⁵⁶

3 Plaintiffs' focus on the University of Nebraska PEO program as an example of stipends for
4 student-athletes above COA, without repercussions to consumer demand or integration, likewise
5 fails to provide meaningful support for Plaintiffs' proposed less restrictive alternatives. Unlike the
6 unlimited compensation of student-athletes for athletic performance that Plaintiffs seek by
7 eliminating the rules, Nebraska's PEO program is consistent with principles of amateurism. As Mr.
8 Lennon explained, the program constitutes institutional aid for further education at the same
9 institution—either in a graduate school setting, cultural education through a study abroad program
10 while still enrolled at the university, or in the form of vocational education through an internship.²⁵⁷
11 Moreover, the Nebraska PEO program is particularly inapposite here because Plaintiffs are not
12 asking this Court to permit each student-athlete to receive the same set amount of compensation. Far
13 from it. Plaintiffs explicitly urge this Court *not* to adopt such an approach and instead to eliminate
14 all caps on player compensation and benefits so that universities and conferences may award
15 student-athletes differing amounts and, in some cases, well above \$7,500.²⁵⁸

16 **C. The Evidence at Trial Demonstrated That Plaintiffs' Proposals Are Not Viable** 17 **Alternatives to the NCAA Compensation Rules**

18 Though it is plainly not Defendants' burden to disprove the viability of Plaintiffs' less
19 restrictive alternatives, Defendants' uncontradicted evidence establishes that the elimination of
20 uniform, national compensation limits and enforcement would devalue intercollegiate athletics,
21 undermine integration of student-athletes and significantly increase system costs, even if conferences
22 were to independently develop, implement, and enforce limits of their own.

23 **1. *National Rules Are Essential for Amateur Intercollegiate Athletics***

24 ²⁵⁴ Tr. 361:9-21, 2099:5-10 (Noll).

25 ²⁵⁵ Tr. 2090:16-21 (Noll).

26 ²⁵⁶ Tr. 636:10-17, 637:6-639:17 (Heckman). In addition, one of the authors, Marc Edelman, is a
former colleague of Plaintiffs' counsel, Jeffrey Kessler, a fact Plaintiffs apparently did not disclose
to Dr. Noll. Tr. 2094:10-15 (Kessler); Tr. 2093:14-23 (Noll).

27 ²⁵⁷ Tr. 1638:11-1640:13 (Lennon).

28 ²⁵⁸ See Pls.' Closing at 43.

1 While Plaintiffs assert that if schools, conferences, the NCAA, fans, networks and sponsors
 2 all value amateurism, then there should be no need for national amateurism rules, Plaintiffs have not
 3 met their burden of showing that eliminating national rules would be “virtually as effective as *not*
 4 allowing compensation.”²⁵⁹ The subset of NCAA bylaws governing amateurism “define[s] the
 5 product the NCAA has on offer – amateur intercollegiate athletics.”²⁶⁰ While the NCAA’s Principle
 6 of Amateurism²⁶¹ sets out the basic tenet of not paying student-athletes, how to apply that tenet in
 7 myriad contexts is not always self-evident and is not necessarily self-executing. As Dr. Elzinga
 8 explained, “[b]ecause reasonable people can disagree about whether various specific benefits violate
 9 the general principle of amateurism, the NCAA adopts specific rules to provide guidance and
 10 facilitate enforcement.”²⁶²

11 Absent uniform rules enacting a common understanding of what it means for a student-
 12 athlete to be an amateur, an individual school or conference—acting rationally—could allow
 13 excessive pay to student-athletes, benefitting itself while spreading the costs of such a decision
 14 across the whole of college sports. This creates a negative externality, because the school or
 15 conference “making such a decision does not incur all the costs of its actions.”²⁶³ The uniform
 16 amateurism standard established by the NCAA’s bylaws “help[s] make it possible for universities to
 17 provide the amateur athletic competition consumers value by helping solve the externality
 18 problem.”²⁶⁴ The individual bylaws governing financial aid available to student-athletes therefore
 19

20 ²⁵⁹ *O’Bannon*, 802 F.3d at 1076 (emphasis in original; internal quotation marks omitted).

21 ²⁶⁰ Elzinga Dir. Test. at 16 n.35.

22 ²⁶¹ The NCAA Constitution sets out a series of “Principles for Conduct of Intercollegiate Athletics”,
 23 one of which is “The Principle of Amateurism.” J0024-0015, 0016 (NCAA Const. art. 2, art. 2.9);
 24 *see also* J0024-0013 (NCAA Const. art. 1.3.1) (“A basic purpose of [the NCAA] is to maintain
 25 intercollegiate athletics as an integral part of the educational program and the athlete as an integral
 26 part of the student body and, by so doing, *retain a clear line of demarcation between intercollegiate
 athletics and professional sports.*” (emphasis added)). That principle states: “Student-athletes shall
 be amateurs in an intercollegiate sport, and their participation should be motivated primarily by
 education and by the physical, mental and social benefits to be derived. Student participation in
 intercollegiate athletics is an avocation, and student-athletes should be protected from exploitation
 by professional and commercial enterprises.” J0024-0016 (NCAA Const. art. 2.9).

27 ²⁶² *See* Elzinga Dir. Test. ¶ 92.

28 ²⁶³ Elzinga Dir. Test. ¶ 37, 18 n.39.

²⁶⁴ Elzinga Dir. Test. ¶ 29.

“promote[] economic efficiency by preventing schools . . . from taking action that is economically inefficient by diminishing the value of the product to the entire group.”²⁶⁵ As the Supreme Court has explained, “the integrity of the ‘product’ [amateur intercollegiate athletics] cannot be preserved except by mutual agreement; if an institution adopted such restrictions unilaterally, its effectiveness as a competitor on the playing field might soon be destroyed.”²⁶⁶

Plaintiffs’ experts contend that conference-level rules would be as effective as national rules because a conference, like any business, “will act rationally” and “will not shoot itself in the foot by allowing compensation that will hurt consumer demand or integration.”²⁶⁷ But this prediction is contrary to fundamental economic principles, untested, and unproven by Plaintiffs’ witnesses. While a self-interested conference may not “shoot *itself* in the foot,” by definition such a conference will not take into the account the interests of other conferences when setting its own compensation rules. When Dr. Rascher states that “[s]chools and conferences will only choose to adopt those rules regarding compensation that are consistent with their demand assessments and objectives,”²⁶⁸ he fails to recognize that some schools or conferences might make choices to increase demand for their own programs, counting on the fact that the decrease in overall demand for college sports will be borne principally by other schools or conferences.

2. *Plaintiffs’ Proposed Injunctions Would Reduce Consumer Demand*

In order for the independent NCAA member institutions to offer amateur intercollegiate athletics (*i.e.*, competitions between different colleges)—which, as the evidence detailed above demonstrates, drives consumer demand—“a standard definition of what it means for an athlete to be an amateur is essential.”²⁶⁹ As Dr. Elzinga explained, “In order for the NCAA’s rules to enable universities to offer amateur student-athletics that will be regarded as fair, ambiguity in interpretation needs to be resolved and the rules need to be perceived as the same for all

²⁶⁵ Elzinga Dir. Test. ¶¶ 37-38.

²⁶⁶ *Bd. of Regents*, 468 U.S. at 102.

²⁶⁷ Pls.’ Closing at 31.

²⁶⁸ Rascher Reb. Test. ¶ 57.

²⁶⁹ Elzinga Dir. Test. ¶ 26.

competitors.”²⁷⁰ If different schools or conferences adhered to different standards of amateurism, either through different compensation rules or different approaches to what constitute “education related expenses or benefits,” it would delegitimize competition between those teams and ultimately reduce consumer demand for such competition.²⁷¹

Numerous defense witnesses testified that, if allowed, some NCAA member institutions inevitably would allow significantly more compensation for student-athletes and that this outcome would reduce the value of college athletics overall. Commissioner Larry Scott testified that differential pay systems among the conferences “would create consumer confusion” concerning the intercollegiate sports product.²⁷² That confusion among fans, broadcasters and sponsors would lead to a diminution in the value of college sports. Specifically, because conference-level rulemaking would result in “different conferences having . . . potentially vastly different rules on . . . compensation” which would “make it much harder and murkier for fans to understand what is college sports, what is the motivation, why are student athletes participating” and “for the entities that invest in college sports, notably TV broadcasters, sponsors, to understand the values that they’re associating with and communicate that to the public.”²⁷³ As Commissioner Scott explained, the “fragmentation” that would occur if conferences could set different compensation rules would devalue the product itself:

[I]n my experience, and I’ve been involved in pro[fessional] sports and collegiate sports, you know, having a clear set of values and having clarity about the structure of a sport is essential to maximizing value. You know, you don’t see any other successful -- big successful sports leagues with significantly different rules across that league. It just doesn’t happen.²⁷⁴

This testimony was bolstered by that of Commissioner Michael Aresco, and by the expert analysis of Dr. Kenneth Elzinga. Commissioner Aresco, a former college sports broadcasting executive at ESPN and CBS, echoed the importance, for broadcasters and fans, of product

²⁷⁰ Elzinga Dir. Test. ¶ 34.

²⁷¹ Elzinga Dir. Test. ¶ 35.

²⁷² Tr. 1140:14-1141:12.

²⁷³ Tr. 1141:18-1142:2 (Scott).

²⁷⁴ Tr. 1142:8-14.

1 differentiation between college sports and professional sports.²⁷⁵ And Dr. Elzinga explained that
 2 certain conferences inevitably would act in their own self-interest and offer student-athletes more
 3 benefits in an effort to obtain better players and raise consumer demand.²⁷⁶ And while consumer
 4 demand for that particular conference might be positively impacted, he noted there would be
 5 negative impact upon others, with the overall result of degrading the national product, particularly
 6 for the significant number of fans who value amateurism.²⁷⁷

7 Numerous witnesses also testified that a move to pay-for-play would harm national
 8 championships and disrupt traditional rivalries in football and basketball.²⁷⁸ With respect to March
 9 Madness in particular, there was significant evidence that the value of that tournament, the principal
 10 source of revenues for the NCAA and many conferences, would be damaged if pay-for-play were
 11 allowed. Commissioner Scott testified that a system of conference-level rulemaking “would
 12 significantly increase the gap between the so-called haves and have nots,” negatively impacting the
 13 competitive playing field of the tournament and undermining a “key attribute” of popularity—the
 14 “Cinderella stories” where schools with fewer resources have the chance to advance in the
 15 tournament.²⁷⁹ Gene Smith agreed that eliminating caps on benefits as Plaintiffs propose would
 16 negatively impact the NCAA tournament, citing precisely the same concern that the preexisting
 17 “disparity in the haves and the have-nots . . . would be widened significantly”²⁸⁰ As a result,
 18 the “reality is the tournament would change. It would be less schools. Would it exist? Of course it
 19 would. But it would certainly diminish and would certainly have an impact on a number of different
 20 schools having an opportunity to participate.”²⁸¹

23 ²⁷⁵ Tr. 1003:17-1004:22.

24 ²⁷⁶ Tr. 457:9-19.

25 ²⁷⁷ Tr. 445:19-22, 457-459.

26 ²⁷⁸ See Tr. 1143:3-24 (Scott) (“I do worry about the effect on rivalries, the traditions, the history” if
 conferences set different compensation rules); Tr. 1513:23-15 (Smith) (if traditional rivals Michigan
 and Ohio chose to engage in differential compensation systems “it would end the series.”).

27 ²⁷⁹ Tr. 1145:4-1146:6.

28 ²⁸⁰ Tr. 1460:13-22, 1461:6-14.

²⁸¹ Tr. 1461:19-23 (Smith).

Consistent with this fact-witness testimony, Dr. Elzinga opined that enjoining the challenged rules could lead to a “balkanization” of the tournament, with different tournaments for different levels of pay.²⁸² At a minimum, the overall value of the tournament would be reduced because it would transform into one where pros who are paid to play would be competing against athletes who are not.²⁸³ The notion that some schools might stop participating altogether under these circumstances was supported by Chancellor Blank, who testified that a pay-for-play model could “take [Wisconsin] out of the sort of national competitions that we’ve been in,” including “absolutely” March Madness.²⁸⁴

3. *Integration Would Suffer if the Challenged Rules Were Eliminated*

Plaintiffs also failed to demonstrate how their proposed injunctions would promote the procompetitive goal of integration, let alone how they would do so as well as the challenged rules. Plaintiffs’ trial strategy was to attempt to undermine Defendants’ evidence that the challenged rules promote integration by demonstrating that integration is not negatively impacted by currently *permissible* benefits, such as the receipt of participation awards, Olympic Gold grants, the Nebraska PEO program or professional league signing bonuses in one sport while maintaining eligibility in another (while also arguing that student-athletes are not currently integrated).²⁸⁵ But these examples shed no light on the effect that allowing systematic, uncapped institutional pay for participation in intercollegiate athletics would have across Division I. And the professional educators that testified, Chancellor Blank, President Hatch, and Nobel laureate Dr. James Heckman, unequivocally rebuffed the notion of paying student-athletes as inconsistent with the university’s educational mission.²⁸⁶ These educators and others who testified also flatly rejected the wisdom of implementing a first-of-its-kind educational experiment in which student-athletes (and only student-athletes) are paid for

²⁸² Tr. 525:18-526:14.

²⁸³ *Id.*

²⁸⁴ Tr. 893:3-9.

²⁸⁵ *See, e.g.*, Tr. 1638:13-1640:13 (Lennon) (explaining the legality of the Nebraska PEO program); Tr. 735-36 (Jenkins).

²⁸⁶ Tr. 886:18-887:3 (Blank) (noting the importance of student-athletes having the same experiences as the broader student body), Tr. 890:11-14, 23-25; Tr. 2008:7-14 (Hatch); Tr. 631:4-632:15 (Heckman) (academic progress incentives would “change the nature of the relationship, I think, of those students to the university compared to other students” and be “isolating”).

grades or graduating.²⁸⁷ Even Dr. Noll had to admit that the academic literature at best suggests the impact of financial incentives on student achievement is zero and is *negative* for low ability students.²⁸⁸

4. *Increased Cost of Conference-Level Rulemaking*

The evidence at trial also demonstrated that conference level rulemaking, if it were to occur, would be much more expensive than the existing rules and would lead to a fracturing of the existing 32 Division I football and basketball conferences. As Commissioner Scott testified, if “there were no national NCAA rules with respect to compensation and benefits, but rather individual conferences had to create their own rules in that regard,” “there would be significant additional infrastructure and expense that [the conferences] would all have to bring to rule development, to discussing, deciding, creating the rules.”²⁸⁹ In addition, Commissioner Scott testified that the conferences each would have to incur significant expense to recreate the NCAA enforcement structure already in place:

Because when you set the rules, that also comes with enforcing them as well. And there’s a very, very significant head count in Indianapolis that handles investigations, enforcement, adjudication, that certainly the Pac-12 would have to recreate to a certain extent. And that would – that would be significant. And then each of the other conferences no doubt would -- would have to do the same.²⁹⁰

²⁸⁷ Tr. 895:20-896:15 (Blank) (explaining that she would “worry about the incentive effects that you’d be creating” including the “negative message” it would send to students who need more help and mentoring the first year and also “reducing the incentive to take the hard courses”); Tr. 1999:13-24 (Hatch) (Wake Forest “would never consider” paying its students money for achieving certain grades “because it’s not the right motivation.”); Tr. 618:2-619:5 (Heckman) (academic literature has said the effect of academic incentives is zero and might even be negative; “one of the internal rules of incentive models, [is] that you will try to achieve that objective at lowest cost, which might be taking easier courses”); *see also* Tr. 494:11-495:10 (Elzinga) (pay for grades could establish a “perverse incentives so that a student would decide to take a less desirable curriculum because the payment for the grade point average in a different major would be beneficial financially to the student but might not . . . enhance the academic quality of the education.”), 505:21-506:17; Tr. 1469:18-1470:9 (Smith) (student athlete incentives for reaching a certain grade point would be inappropriate and harmful and “would have a significant impact on our ability to ensure that the behavior of our student athletes maintains their focus on their academics”).

²⁸⁸ Tr. 2115:3-17 (Noll) (agreeing that Dr. Fryer, a tenured professor at Harvard, concluded “I estimate that the impact of financial incentives on student achievement is statistically zero in each city.”); 2115:21-2118:1 (Noll) (agreeing that another academic study published in the *Journal of the European Economic Association* “casts doubt” on there being a positive relationship between financial incentives and achievement and finds that “low ability students achieve less” when assigned financial rewards).

²⁸⁹ Tr. 1135:25-1136:15.

²⁹⁰ Tr. 1136:20-1137:1.

1 The Pac-12 is not the only conference with no enforcement structure in place. Commissioner
 2 Aresco similarly testified that the American Athletic Conference does not have an enforcement staff,
 3 but only a compliance staff that simply assists schools in an advisory role.²⁹¹ If the conference had
 4 to create and enforce its own rules, that would be “a whole new dimension” which would require the
 5 conference to hire additional personnel to perform enforcement and conduct investigations in place
 6 of the NCAA.²⁹² Other conference witnesses also testified during their depositions, about the
 7 differences in enforcement infrastructure between the NCAA and the conferences.²⁹³

8 Plaintiffs cannot reply that any increased costs for conference or schools would be offset by
 9 savings at the NCAA, because the NCAA’s enforcement infrastructure could not be eliminated. As
 10 explicitly acknowledged in Plaintiffs’ proposed injunctions, even if all NCAA compensation rules
 11 were eliminated, significant numbers of NCAA “rules regarding academic eligibility, third-party
 12 payments to college athletes, transfers, name, image, and likeness rights, or other NCAA regulations
 13 not challenged in this case”²⁹⁴ would still remain to be enforced through the national body’s
 14 investigative and infractions processes. Aside from Dr. Rascher’s unsupported conjecture, Plaintiffs
 15 proffer no trial evidence for their bare assertions (at 4, 34-35) that elimination of the current
 16 centralized enforcement system with its economies of scale would somehow translate into savings at
 17 the conference level. And Plaintiffs’ suggestion (at 4, 34-35) that the conferences could simply
 18 “leav[e] in place the current NCAA enforcement apparatus” or avail themselves of the new NCAA
 19 apparatus contemplated by the Rice Commission is nonsensical, since the contemplated injunction
 20 would *prohibit* the NCAA from having any role in enforcing compensation rules.²⁹⁵

21
 22 ²⁹¹ Tr. 1037:24-1038:4.

23 ²⁹² Tr. 1038:11-1039:2 (Aresco).

24 ²⁹³ See, e.g., Hostetter Tr. 18:4-11; Price 30(b)(6) Tr. 6:20-7:2.

25 ²⁹⁴ Requested Injunction, Pls.’ Op., App’x C.

26 ²⁹⁵ See Pls. Op., App’x C & D (proposing that the NCAA and any person “in active concert or
 27 participation with them” be “permanently restrained and enjoined from . . . enforcing or attempting
 28 to enforce, now or in the future” compensation rules for Division I basketball and football athletes).
 Plaintiffs’ suggestion that the conferences could rely on NCAA infrastructure is also a tacit
 admission that the current conference infrastructure is not sufficient to support the kind of
 enforcement apparatus that would be needed if the national compensation system were
 decentralized.

1 In addition to the inevitable administrative costs²⁹⁶ to develop new rules and an infrastructure
 2 to enforce them and investigate infractions, and the costs associated with providing pay and/or
 3 additional benefits to student-athletes,²⁹⁷ there would be additional monetary costs triggered by the
 4 disruption to the conference system through realignment.²⁹⁸ If major conferences were to have
 5 different compensation rules, those differing schemes would be “a major driver of schools deciding
 6 to leave our conference or – or join our conference based on . . . different sets of values.”²⁹⁹

7 Dr. Nathan Hatch testified that he expected a similar “shakeout”—meaning a division among
 8 conference members—in his school’s conference, the Atlantic Coast Conference, if the NCAA’s
 9 compensation and benefits rules were enjoined.³⁰⁰ While Dr. Hatch testified that Wake Forest would
 10 not go to a pay-for-play system, he noted the “deep sense” that other schools would and the reason it
 11 is not publicly stated by school presidents is that the issue is “deeply divisive” within institutions.³⁰¹
 12 But whether some schools would pay more than cost of attendance if the rules allowed it is not in
 13 dispute—Dr. Rascher agrees that some would offer pay to participate in athletics.³⁰²

14
 15 ²⁹⁶ Plaintiffs misleadingly argue (at 33) that Defendants have conceded that “administrative
 16 implementation costs” are the only relevant costs for this inquiry. Not true. At the page cited,
 17 Defendants simply explained the significant administrative costs that would ensue. Defs.’ Op. at 45.

18 ²⁹⁷ Cf. *O’Bannon*, 802 F.3d at 1075 (rejecting an “increase[d] costs” defense because “the NCAA
 19 already permits schools to fund student-athletes’ full cost of attendance”); *see also id.* at 1076 n.19
 20 (noting the lack of “findings about whether allowing schools to pay students NIL cash compensation
 21 will significantly increase costs to the NCAA and its member schools”).

22 ²⁹⁸ *See* Tr. 1141:15-16 (Scott) (noting “it might actually disrupt the conference makeup”). The
 23 disruptive effect of conference realignment was explained by Michael Aresco, former Commissioner
 24 of the Big East Conference, who testified that conference “was torn apart by conference
 25 realignment” when seven schools left the conference leading to “disarray” and questions about
 26 whether the conference could continue. Tr. 1014:1-20.

27 ²⁹⁹ Tr. 1143:12-21 (Scott).

28 ³⁰⁰ Tr. 2015:10-24, 2016:16-18.

³⁰¹ Tr. 2008:7-14, 2016:25-2017:7. The issue of whether schools would go to pay-for-play or change
 their athletic program is so contentious that University of Wisconsin Chancellor Rebecca Blank was
 compelled to issue a public statement following her testimony that a pay-for-play system would
 cause her school to fundamentally reconsider its student-athlete program, potentially causing it to
 exit the kinds of national programs they currently compete in, including March Madness. Tr.
 892:15-893:9 (Blank); Dkts. 1054, 1056.

³⁰² Tr. 113:15-20. Numerous fact witnesses testified that it is generally accepted, and they
 personally expected, that agreed some schools would pay more than cost of attendance if allowed.
See, e.g., Tr. 1461:14-18 (Smith) (“[T]here would be those who choose to - - compensate student
 athletes at a higher level. And there’ll be those who choose not to. There’ll be those who may
 choose to do something different relative to athletics.”); Tr. 972:3-6 (Blank) (testifying it was “quite
 possible” that some schools in The Big Ten would decide to pay student-athletes if NCAA rules
 (cont.)

At the opposite end of the spectrum, these changes might also trigger certain schools or conferences to leave the NCAA or Division I. For example, the Commissioner of the America East testified that schools in her conference do not have the budget to pay cost of attendance, much less above cost of attendance scholarships, and “would strongly reconsider their position in the NCAA”³⁰³

D. The Existing Autonomy Governance Model Bears No Relationship to Plaintiffs’ Requested Relief

This Court should reject the proposition that the current autonomy structure establishes a precedent for Plaintiffs’ proposal to eradicate amateurism. As shown by undisputed testimony elicited by both sides, the current autonomy structure grants to the ACC, The Big Ten, Big 12, SEC and Pac-12 the ability to *collectively* adopt certain legislation within limited areas subject to overriding NCAA rules—including, of particular relevance here, the commitment to amateurism, which means these conferences may not simply decide they will abandon all restrictions on student-athlete compensation.³⁰⁴ The core purpose behind the autonomy rules was to provide limited legislative leeway to those five conferences in specific areas while remaining within the “big tent”—*i.e.*, the national rulemaking body that is the NCAA—and without “having to replicate, duplicate” or “conflict” with that larger “ecosystem of college sports.”³⁰⁵ The range of permissible rulemaking within autonomy was “very limited” and the same rules the five conferences enact for adoption may be adopted by other schools.³⁰⁶ Plaintiffs’ proposed injunctions bear no similarity to the NCAA autonomy rules—they would allow unlimited compensation and prohibit precisely the kind of collective rulemaking process the NCAA’s structure requires for the five “autonomy” conferences to

allowed it); Tr. 2016:25-2017:7 (Hatch) (noting that there is a “deep sense” that schools would pay more than cost of attendance if permitted); Tr. 1142:16-22 (Scott) (testifying that it “has been discussed for some time” that if there were “no rules around compensation . . . some schools in some parts of the country might start paying players”).

³⁰³ Tr. 2059:24-2061:2 (Huchthausen).

³⁰⁴ Tr. 1132:20-1133:5 (Scott); Tr. 1264:17-1265:3 (Lennon); Berst Tr. 246:15-247:3; Emmert Tr. 178:5-179:1. For example, the five conferences’ election to redefine “grant-in-aid” to cost of attendance is now at the maximum allowable financial aid permitted under NCAA rules, which cannot be changed by the five conferences. Tr. 1618:14-22 (Lennon).

³⁰⁵ Tr. 1133:14-1134:16 (Scott). *See also* Tr. 1265:8-17 (Lennon).

³⁰⁶ Tr. 1135:11-17 (Scott).

1 adopt rules within the existing commitment to amateurism.³⁰⁷ Plaintiffs do not satisfy the required
 2 “strong evidentiary showing that [their] alternatives are viable here” by applying the “autonomy”
 3 label to their requested relief.³⁰⁸

4 **E. Affording the NCAA Ample Latitude Precludes This Court from Implementing**
 5 **a Numerical Compensation Cap or Tinkering with Individual Benefits**

6 The fact that Plaintiffs have failed to prove that any of their three proposed less restrictive
 7 alternatives are viable should end the analysis. However, for the sake of completeness, Defendants
 8 will address various potential additional benefits Plaintiffs argued during trial that Defendants could
 9 make available to student-athletes (although none of those proposed benefits are embodied in any
 10 proposed less restrictive alternative or other form of relief that Plaintiffs propose). As the Ninth
 11 Circuit advised in *O’Bannon*, the third step in the rule of reason analysis is not an invitation for
 12 courts “to make marginal adjustments to broadly reasonable market restraints” or “to micromanage
 13 organizational rules.”³⁰⁹ Rather, a court should only replace a restraint with a less restrictive
 14 alternative where the “restraint is *patently and inexplicably* stricter than is necessary to accomplish
 15 all of its procompetitive objectives”³¹⁰ Ordering individual additional benefits that Plaintiffs
 16 discussed during trial would clearly be mere marginal adjustments to reasonable market restraints,
 17 and contrary to the ample latitude the NCAA is afforded.

18 *Numerical Compensation Cap.* Plaintiffs concede (at 43) that it would be error for the Court
 19 to enter an injunction that supplants existing NCAA rules with a higher compensation cap at a
 20 specific dollar amount. Despite repeated inquiry, not one of Plaintiffs’ experts could tell the Court
 21 that there is some injunction, or some “magic number,” that the Court could grant as relief that
 22 would maintain the procompetitive benefits of the challenged rules. Dr. Rascher provided no
 23 numeric value that the market could bear, but rather opined that conferences and schools would
 24 conduct market research to attempt to determine a number, and it could take them nearly a decade to

25 ³⁰⁷ See Requested Injunction and Proposed Injunction, Pls.’ Op., App’x C & D.

26 ³⁰⁸ *O’Bannon*, 802 F.3d at 1074.

27 ³⁰⁹ *Id.* at 1075.

28 ³¹⁰ *Id.*

determine what the right number might be.³¹¹ Further, in response to questioning from the Court, Dr. Noll made plain that there is no “safe number” that one could “safely say definitely wouldn’t cause any decrease in demand.”³¹²

Individual Benefits. Although not proposed by Plaintiffs as less restrictive alternatives, certain of Mr. Poret’s test scenarios purported to test the sustainability of consumer demand if various benefits were individually offered. An injunction restraining the NCAA from prohibiting any or all of these individual benefits patently would tinker with the association’s rules. Moreover, setting aside the substantial deficiencies in Mr. Poret’s survey, the survey would *at most* provide support for providing only one individual tested benefit, as he did not even test what would happen if any combination of his scenarios were offered together.³¹³ As discussed, *supra* (at 28-29, 44-45), the weight of the evidence also demonstrates that certain benefits, such as financial incentives for academic benchmarks, are neither effective nor consistent with the goals of higher education, while other benefits, such as post-graduation benefits for students who have exhausted eligibility, are already allowed (so long as they are provided at the same institution).

IV. THERE IS NO FOURTH “BALANCING” STEP

Plaintiffs’ failure to prove the availability of a less restrictive alternative should end the Court’s inquiry, as there is no fourth “balancing” step. This Court recognized in *O’Bannon* that “[c]ourts typically rely” on the three-step “burden-shifting framework” to determine whether a restraint’s harm to competition outweighs its procompetitive effects.³¹⁴ Plaintiffs agreed as recently as May 15, 2018, that analyzing less restrictive alternatives was “[t]he final step in the rule-of-reason

³¹¹ Tr. 104:10-106:18.

³¹² Tr. 387:16-388:7 (“... I don’t actually know -- I don’t actually have an opinion about the existence of some pay. I don’t know what it would be ... So saying there is a magic number that should apply to all players, this is probably not true. The evidence – there’s no empirical evidence for the existence of such a magic number.”). Dr. Heckman’s testimony concerning the Sanderson & Siegfried article does not establish that a \$200,000 compensation limit would be appropriate to maintain the observed procompetitive justifications. It was not Dr. Heckman’s testimony, and the Sanderson & Siegfried article does not stand for the proposition, that only once payments at or above \$200,000 are allowed would there be a diminution in the observed procompetitive justifications. Dr. Noll agrees that the Sanderson & Siegfried analysis does not support such a view. Tr. 2071:14-2072:15.

³¹³ Tr. 1657:18-1658:16 (Poret).

³¹⁴ 7 F. Supp. 3d at 985 (explicitly referring to step three as the final step).

analysis.”³¹⁵ Plaintiffs’ late request for a fourth “balancing” step in the event they lose at step three defies both the Ninth Circuit’s statement in *O’Bannon* that the “final inquiry” in the rule of reason analysis is “whether there are reasonable alternatives to the NCAA’s current compensation restrictions,”³¹⁶ and its statement (again in *O’Bannon*) that where the NCAA’s “regulations truly serve procompetitive purposes, *courts should not hesitate to uphold them.*”³¹⁷ And the request also runs counter to the Supreme Court’s recent decision in *Ohio v. American Express Co.*, in which the Court unanimously agreed that the rule of reason inquiry consists of a “three-step, burden-shifting framework.”³¹⁸ Moreover, even if the Court were to find that balancing may theoretically be appropriate, balancing does not make sense in this context and Plaintiffs have not provided the Court with anything to balance.

A. Ninth Circuit Precedent Does Not Call for a Fourth Balancing Step

Although *O’Bannon* is dispositive on the absence of a fourth “balancing” step in this context, other Ninth Circuit case law addressing antitrust challenges to NCAA and conference rules also compel this result. For the three-step burden-shifting framework in *O’Bannon*, both this Court and the Ninth Circuit cited *Tanaka v. University of Southern California*.³¹⁹ *Tanaka*, which involved a challenge to the then-Pac-10’s restrictions on transfers, made no mention of a fourth “balancing”

³¹⁵ Dkt. 818 at 10 (internal quotation marks omitted; alteration in original). This Court also agreed that the three-step approach applies when it ruled on the parties’ motions for summary judgment. MSJ Order at 25-26 (“The final step in the rule-of-reason analysis is whether Plaintiffs can ‘make a strong evidentiary showing’ that any legitimate objectives can be achieved in a substantially less restrictive manner.” (quoting *O’Bannon*, 802 F.3d at 1074)). Indeed, Plaintiffs avoided summary judgment by arguing that *O’Bannon* merely “suppl[ies] the method of antitrust analysis for scrutinizing the challenged restraints in the relevant markets here.” Dkt. 714-01. Having prevailed with that approach, Plaintiffs are judicially estopped from taking a different tack now. *See, e.g., Hamilton v. State Farm Fire & Cas. Co.*, 270 F.3d 778, 782 (9th Cir. 2001) (explaining that judicial estoppel “precludes a party from gaining an advantage by asserting one position, and then later seeking an advantage by taking a clearly inconsistent position”).

³¹⁶ 802 F.3d at 1074.

³¹⁷ *Id.* at 1079 (emphasis added).

³¹⁸ 138 S. Ct. at 2284 (emphasis added); *id.* at 2290 (Breyer, J., dissenting) (“I agree with the majority and the parties that this case is properly evaluated under the three-step ‘rule of reason’ that governs many antitrust lawsuits.”). Plaintiffs correctly note that only the *American Express* dissent suggested that courts could conduct a separate balancing inquiry in lieu of evaluating less restrictive alternatives. *See* Pls.’ Op. at 36. The majority opinion was clear that at step three “the burden shifts back to the plaintiff to demonstrate that the procompetitive efficiencies could be reasonably achieved through less restrictive means.” *Am. Express*, 138 S. Ct. at 2284.

³¹⁹ 252 F.3d at 1063.

1 step.³²⁰ And *Hairston v. Pacific 10 Conference*, the case upon which *Tanaka* relied, leaves no doubt
 2 that there is no fourth “balancing” step in this case. It involved a Sherman Act challenge to penalties
 3 for violations of the NCAA’s amateurism rules.³²¹ The Ninth Circuit granted summary judgment for
 4 the then-Pac-10 and NCAA because the plaintiffs failed to meet their burden at step three.³²² A
 5 fourth “balancing” step is irreconcilable with *Hairston*.³²³ And for good reason: the three-step
 6 inquiry *itself* strikes the appropriate balance, encompassing the factors that the Ninth Circuit and
 7 other courts have found dispositive and dictating how to consider them in relation to each other.

8 The two cases Plaintiffs cite—neither of which involved the NCAA or any conference or
 9 school—are unpersuasive. Both cases solely relied on the treatise “Fundamentals of Antitrust Law”
 10 for the suggestion that there is such a fourth step.³²⁴ In both cases, moreover, the suggestion of a
 11 fourth step was dicta because the court resolved the case at an earlier step. Specifically, *Bhan v.*
 12 *NME Hospitals, Inc.*, offers no guidance as to how balancing would work because the plaintiff failed
 13 at step one—there was no anticompetitive harm.³²⁵ And in *County of Tuolumne v. Sonora*
 14 *Community Hospital*, the court ultimately concluded that a hospital’s privileging criteria were
 15 procompetitive because (1) the plaintiffs failed at step three, and (2) numerous other cases had
 16 concluded that hospital privileging criteria were procompetitive.³²⁶ To the extent *County of*
 17 *Tuolumne* offers any guidance here, it suggests that unless Plaintiffs offer an alternative that is

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20 ³²⁰ See *id.* (citing *Hairston*, 101 F.3d at 1319).

21 ³²¹ 101 F.3d at 1317.

22 ³²² *Id.* at 1319.

23 ³²³ *Id.* Accord *Virgin Atl. Airways Ltd. v. British Airways PLC*, 257 F.3d 256, 265 (2d Cir. 2001)
 (“Virgin’s failure to address [step three] leaves intact the evidence that British Airways’ incentive
 24 agreements are good for competition.”); *Toscano*, 201 F. Supp. 2d at 1123 (“[E]ven if Toscano had
 25 demonstrated that the [Senior PGA Tour’s] eligibility rules had a significant anticompetitive effect,
 he would still lose under the rule of reason because he both fails to rebut the fact that there are
 procompetitive justifications for the rules and to show that the procompetitive objectives could be
 achieved in a less anticompetitive manner.”).

26 ³²⁴ See *Cty. of Tuolumne*, 236 F.3d at 1160; *Bhan v. NME Hospitals, Inc.*, 929 F.2d 1404, 1413
 (1991).

27 ³²⁵ See 929 F.3d at 1413.

28 ³²⁶ 236 F.3d at 1160.

“‘virtually as effective’ in serving the procompetitive purposes of the NCAA’s current rules, and ‘without significantly increased cost,’” the Court should leave the NCAA’s rules intact.³²⁷

B. Balancing in This Case Is Not Even Theoretically Possible

Even the authors of “Fundamentals of Antitrust Law” recognized that any balancing would be inherently difficult and that “[i]n the vast majority of rule of reason cases, even complex ones such as *O’Bannon*, real balancing is not necessary.”³²⁸ In *O’Bannon*, the Ninth Circuit “did not balance, but rather applied a purely binary distinction between amateur and professional play.”³²⁹ Balancing would require both quantifying and comparing the anticompetitive effects and procompetitive benefits of a challenged restraint, which is not possible in this context.³³⁰ Even if Plaintiffs had made an effort to quantify the anticompetitive effects of the challenged rules, comparing such a figure to consumer demand for amateur athletics or academic integration would be “like judging whether a particular line is longer than a particular rock is heavy.”³³¹

Not surprisingly, Defendants are not aware of a single case in which a court has purported to apply a fourth “balancing” step after a plaintiff failed at step three, and concluded that a restraint was

³²⁷ *O’Bannon*, 802 F.3d at 1079 (quoting *Cty. of Tuolumne*, 236 F.3d at 1159, and citing multiple cases recognizing the NCAA’s role in superintending amateur college sports). While necessarily rejecting the existence of a fourth step in both *O’Bannon* and *Hairston*, the Ninth Circuit repeatedly acknowledged *Bhan* and *County of Tuolumne*—they were not simply overlooked. See *O’Bannon*, 802 F.3d at 1074 (citing *Cty. of Tuolumne*, 236 F.3d at 1159); *id.* at 1076 & n.19 (same); *Hairston*, 101 F.3d at 1318 (citing *Bhan*, 929 F.2d at 1410); *id.* at 1319 (citing *Bhan*, 929 F.2d at 1413)). Plaintiffs’ reliance on *Bhan* and *County of Tuolumne* should therefore not compel a different result.

³²⁸ See Herbert A. Hovenkamp, *Antitrust Balancing*, 12 N.Y.U. J.L. & Bus. 369, 383 (2016).

³²⁹ *Id.* at 377 & n.27 (noting that “the line between ‘amateur’ and ‘professional’ athletics was a well-established benchmark that courts had repeatedly approved,” and that *Board of Regents* “emphasized the historic role of the NCAA in promoting amateurism in intercollegiate athletics”).

³³⁰ See *id.* at 384 (cautioning that “[i]n the rare event that balancing is necessary, courts should be aware that unless they have specific, quantifiable amounts to attach to competitive threats and offsetting gains, they are in hazardous territory”); see also 1 J. Kalinowski, *Antitrust Laws and Trade Regulation* § 12.02[5] (2d ed. 2017) (“How a court is to implement this balancing is not clear, perhaps because of difficulties in measuring the competitive effects.”); P. Areeda & H. Hovenkamp, *Fundamentals of Antitrust Law* § 15.02 (4th ed. 2017) (Areeda & Hovenkamp) (“[T]he tribunal must somehow weigh the harm against the benefit.” (emphasis added)). Areeda & Hovenkamp explain the difficulties in more detail: “As a matter of theory, balancing is not even conceptually possible without a unit of measurement. That is, purely ordinal methods of balancing work only when the value on one side is zero. When both sides have some weight, however, we must have a way of netting them out.” Areeda & Hovenkamp § 15.07[d].

³³¹ *Bendix Autolite Corp. v. Midwesco Enterprises, Inc.*, 486 U.S. 888, 897 (1988) (concurring opinion).

unreasonable. Areeda and Hovenkamp observe that “[o]utside of the merger context, no court to our knowledge has ever even attempted to put an actual number, such as dollars of economic loss or gain on either the anticompetitive effects of a restraint or the justifications offered against it.”³³² Indeed, in a Sherman Act case involving a product improvement, the Ninth Circuit has explicitly rejected the notion of trying to weigh procompetitive benefits against anticompetitive effects.³³³

C. Plaintiffs Left the Court with Nothing to “Balance”

Were the Court to proceed to a fourth step, Plaintiffs would have the burden to demonstrate that the challenged rules are, on balance, unreasonable.³³⁴ The treatise section that Plaintiffs cite on balancing would further require that “[w]hen balancing must be performed, the consumer welfare principle insists upon a measurable unit, which is either price or output.”³³⁵ Other than arguing that the challenged rules have zero procompetitive benefits, Plaintiffs made no effort at trial to assign measurable units to the alleged anticompetitive effects, to measure them, or to explain how to weigh those effects against the procompetitive benefits.

With respect to anticompetitive effects, Plaintiffs point only to the Court’s finding at summary judgment that “greater compensation and benefits would be offered in the recruitment of student-athletes absent the challenged rules.”³³⁶ Assuming purely for the sake of argument that such a calculation would be relevant for these purposes, Plaintiffs offered no evidence as to how much

³³² See also Areeda & Hovenkamp § 15.07[d].

³³³ *Appliances Inc. v. Tyco Health Care Grp. LP*, 592 F.3d 991, 1000 (9th Cir. 2010) (“To weigh the benefits of an improved product design against the resulting injuries to competitors is not just unwise, it is unadministrable.”). Other courts have similarly questioned whether it is even possible to measure procompetitive benefits against anticompetitive effects. See *Rothery Storage & Van Co. v. Atlas Van Lines, Inc.*, 792 F.2d 210, 229 n.11 (D.C. Cir. 1986) (“[T]hough it is sometimes said that, in the case of restraints like these, it is necessary to weigh procompetitive effects against anticompetitive effects, we do not think that a useable formula if it implies an ability to quantify the two effects and compare the values found.”); *State of N.Y. by Abrams v. Anheuser-Busch, Inc.*, 811 F. Supp. 848, 872 (E.D.N.Y. 1993) (“[T]he weighing required by the rule of reason is extremely awkward to apply. Competitive effects are not susceptible to any kind of numerical valuation, making the Court’s task a daunting one.”).

³³⁴ *Aydin Corp. v. Loral Corp.*, 718 F.2d 897, 901 (9th Cir. 1983) (stating it is well settled that “[t]he plaintiff in an antitrust action judged under the rule of reason bears the burden of proving unreasonableness”); *Hahn v. Or. Physicians’ Serv.*, 868 F.2d 1022, 1026 (9th Cir. 1988); *Seattle Totems Hockey Club, Inc. v. Nat’l Hockey League*, 783 F.2d 1347, 1350 (9th Cir. 1986); accord Areeda & Hovenkamp ¶ 1502.

³³⁵ Areeda & Hovenkamp § 15.07[d] (cited in Plaintiffs’ Closing at 37).

³³⁶ MSJ Order at 19; Pls.’ Closing at 74.

1 more student-athletes would receive in the absence of the challenged rules.³³⁷ In fact, Plaintiffs
 2 suggested at trial that payments to student-athletes would be insignificant, and that conference-level
 3 compensation rules would not be much different than the NCAA rules currently in place.³³⁸
 4 Plaintiffs also fail to explain by what measure the procompetitive effects “would at most be tiny,”³³⁹
 5 or how one would weigh those effects against any anticompetitive harm.

6 CONCLUSION

7 For the foregoing reasons, Defendants have met their burden at step two, and Plaintiffs have
 8 failed to meet their burden at step three. Accordingly, judgment must be entered for Defendants.

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20 ³³⁷ See, e.g., Tr. 75:18-76:11 (Dr. Rascher testifying that he could not quantify what portion of
 21 coaches’ salaries would go to student-athletes in Plaintiffs’ but-for world). Plaintiffs have never
 22 proven the quantum of anticompetitive effect caused by the restraints in question. Therefore, any
 23 weight given to the procompetitive justifications must necessarily outweigh that unproven effect.
 24 ³³⁸ Dr. Rascher testified that he would be “shocked if the conferences just started allowing unfettered
 25 competition for the athletes.” Tr. 104:10-24. The largest payment tested by Mr. Poret was \$10,000,
 26 Poret Dir. Test. ¶ 24, and Dr. Rascher characterized that amount as “generous.” Rascher Dir. Test.
 27 ¶ 197; see also Tr. 147:4-12 (Rascher) (“can’t imagine a school would go and offer a million
 28 dollars”). When asked by the Court whether there was “any amount of money that the economic
 evidence would show could be offered to student-athletes that would negatively [a]ffect the demand
 for college sports,” Dr. Noll responded that “you could—as long as it’s not just a few thousand
 dollars more.” Tr. 387:3-15 (emphasis added). Dr. Noll suggested that if conferences set their own
 compensation limits, they would adopt identical rules to those in place now. Noll Dir. Test. ¶ 185
 Plaintiffs’ counsel suggested the same in their cross-examination of Dr. Elzinga. Tr. 440:11-441:21.
³³⁹ Pls.’ Closing at 37.

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Respectfully submitted,

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FILER'S ATTESTATION

I, Karen Hoffman Lent, am the ECF user whose identification and password are being used to file Defendants' Closing Brief. In compliance with Local Rule 5-1(i)(3), I hereby attest that all signatories hereto concur in this filing.

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